Supreme Court, U.S.
FILED

001854 JUN 12 2001

OFFICE OF THE CLERK

No. _____

SUPREME COURT OF THE UNITED STATES

MATTHEW J. RYAN; ROBERT C. JUBELIRER;
JESS M. STAIRS AND JAMES J. RHOADES,

Petitioners,

v.

DAVID POWELL, et al.

Respondents.

**ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

PETITION FOR A WRIT OF CERTIORARI

JOHN P. KRILL, JR.
(Counsel of Record)
LINDA J. SHOREY
JULIA M. GLENCER

KIRKPATRICK & LOCKHART LLP
240 NORTH THIRD STREET
HARRISBURG, PENNSYLVANIA 17101
(717) 231-4500

June 12, 2001 *Counsel for Petitioners*

40PP

QUESTIONS PRESENTED

1. Whether an order compelling discovery from parties who are state legislators and whose objection to the discovery rests on legislative immunity is immediately appealable as a collateral order.

2. Whether state officials who intervene in an action that has the potential to affect the performance of their official duties are protected from certain discovery by the privilege that arises from legislative immunity.

LIST OF PARTIES

Petitioners are members of and leaders in the General Assembly of the Commonwealth of Pennsylvania: Matthew J. Ryan, Speaker of the House of Representatives; Robert C. Jubelirer, President *pro tempore* of the Senate; Jess M. Stairs, Chairman of the Education Committee of the House of Representatives and James J. Rhoades, Chairman of the Education Committee of the Senate ("Legislative Leaders"). They intervened in the district court in support of defendants and were appellants in the Court of Appeals.

Respondents, who are plaintiffs in the district court and were appellees in the Court of Appeals, are the City of Philadelphia and its Mayor; the School District of Philadelphia, its Superintendent, its Board of Education and the President of the Board; David Powell; Shelean Parks; Patrice Everage; Julia A. Davis; Yvette Bland; Geraldine Newton; Maria M. Rivera; Mary E. Miller; Gregory Luzak; Catherine Luzak; Fu Zhen Xie; The Black Clergy of Philadelphia and Vicinity; Philadelphia Branch NAACP; ASPIRA, Inc., of Pennsylvania; Parents Union for Public Schools; Citizens Committee On Public Education In Philadelphia; and Parents United for Better Schools, Inc.

TABLE OF CONTENTS

Questions Presented i

List of Parties ii

Table of Contents iii

Table of Authorities vi

Opinions Below 1

Jurisdiction 1

Statutory Provisions Involved 1

Statement of the Case 2

A. Factual Background 2

1. Plaintiffs' Complaint 2

2. Public education in Pennsylvania 3

3. Petitioners 5

B. Proceedings Below 5

1. Intervention and initial proceedings 5

2. Discovery requests and Legislative Leaders' response 6

a. Document production 8

b. Interrogatories 9

3. Proceedings in the district court..... 10

4. Proceedings in the Third Circuit..... 11

REASONS FOR GRANTING THE PETITION

I. THE THIRD CIRCUIT'S DECISION RAISES MATTERS OF NATIONAL IMPORTANCE 12

A. Common Law Legislative Immunity..... 13

B. Legislative Immunity Extends To Discovery 15

C. Federally-Authorized Intrusion Into The Operation Of State Government..... 17

II. THE THIRD CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT AND ALL OTHER CIRCUITS INCLUDING THE THIRD CIRCUIT, WHICH RECOGNIZE THAT AN ORDER DENYING IMMUNITY IS A COLLATERAL ORDER SUBJECT TO IMMEDIATE REVIEW 19

III. THE THIRD CIRCUIT'S DECISION CONFLICTS WITH BASIC LEGAL PRINCIPLES, PRECEDENT OF THIS COURT, AND DECISIONS OF OTHER CIRCUITS, INCLUDING THE THIRD CIRCUIT, AND PRESENTS AN IMPORTANT FEDERAL QUESTION 22

A. Waiver of Legislative Immunity 23

B. An Intervenor Becomes A Party To The Litigation 24

C. Importance to State Government 26

Conclusion 28

TABLE OF AUTHORITIES

FEDERAL CASES

Abney v. United States, 431 U.S. 651 (1977) 21

Agromayor v. Colberg, 738 F.2d 55 (1st Cir. 1984)..... 20

Anthony v. Baker, 955 F.2d 1395 (10th Cir. 1992)..... 20

Auriemma v. Montgomery, 860 F.2d 273 (7th Cir. 1988)..... 20

Bacher v. Allstate Insurance Co., 211 F.3d 52 (3d Cir. 2000)..... 19

Behrens v. Pelletier, 516 U.S. 299 (1996)..... 19, 20, 21

Bines v. Kulaylat, 215 F.3d 381 (3d Cir. 2000)..... 20

Bogan v. Scott-Harris, 523 U.S. 44 (1998) 13, 14

Brown v. Griesenauer, 970 F.2d 431 (8th Cir. 1992)..... 20

Brown & Williamson Tobacco Corp. v. Williams, 62 F.3d 408 (D.C. Cir. 1995)..... 16

Burtnick v. McLean, 76 F.3d 611 (4th Cir. 1996)..... 16

Chateaubriad v. Gaspard, 97 F.3d 1218 (9th Cir. 1996)..... 20

Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949)..... 19, 21, 22

Cooper & Lybrand v. Livesay, 437 U.S. 463 (1978) 19

Digital Equipment Corp. v. Desktop Direct, 511 U.S. 863 (1994)..... 19

Dombrowksi v. Eastland, 387 U.S. 82 (1967)..... 15, 16, 21

Eastland v. United States Serviceman's Fund, 421 U.S. 491 (1975)..... 18

Ellis v. Coffee County Board of Registrars, 981 F.2d 1185 (11th Cir. 1993) 20

Fletcher v. Peck, 6 Cranch 87 (1810)..... 15

In re Ford Motor Company, 110 F.3d 954 (3d Cir. 1997)..... 19

Front Royal & Warren County Industrial Park v. Town of Front Royal, 865 F.2d 77 (4th Cir. 1989)..... 20

Goldberg v. Town of Rocky Hill, 973 F.2d 70 (2d Cir. 1992)..... 20

Gravel v. United States, 408 U.S. 606 (1972)..... 15, 16, 25

Helstoski v. Meanor, 442 U.S. 50€ (1979)..... 19, 20, 21

Larsen v. Senate of the Commonwealth of Pennsylvania, 152 F.3d 240 (3d Cir. 1998)..... 20

Lauro Lines S.L.R. v. Chasser,
490 U.S. 495 (1989) 21

Liberty Mutual Ins. Co. v. Louisiana Dept. of Ins., 62 F.3d 115 (5th Cir. 1995) 20

MINPECO, S.A. v. Conticommodity Services, Inc.,
844 F.2d 856 (D.C. Cir. 1988) 16

Miller v. Transamerican Press, Inc.,
709 F.2d 524 (9th Cir. 1983) 16

Mitchell v. Forsyth, 472 U.S. 511 (1985) 20

New York v. United States, 505 U.S. 144 (1992) 13, 14

Nixon v. Fitzgerald, 457 U.S. 731 (1982) 20

Powell v. Ridge, 189 F.3d 387 (3d Cir. 1999) 6

Prince v. Hicks, 198 F.3d 607 (6th Cir. 1999) 20

Printz v. United States, 521 U.S. 898 (1997) 14

Ridge v. Powell, No. 99-574, 528 U.S. 1046
(Dec. 6, 1999) 6

Ryan v. Powell, No. 99-527, 528 U.S. 1046
(Dec. 6, 1999) 6

San Antonio School District v. Rodriguez,
411 U.S. 1 (1973) 17

Schneider v. Dumbarton Developers, Inc.,
767 F.2d 1007 (D.C. Cir. 1985) 24

Steel Co. v. Citizens for a Better Environment, 523 U.S. 83 (1998) 22

Supreme Court of Virginia v. Consumers Union of the United States, 446 U.S. 719 (1980) 13

Tenney v. Brandhove, 341 U.S. 367 (1951) 13, 14, 15

United States v. Gillock, 445 U.S. 360 (1980) 13

United States v. Helstoski, 442 U.S. 477 (1979) 14, 23

United States v. Johnson, 383 U.S. 169, 180-81 (1966) 14

United States v. O'Brien, 391 U.S. 367 (1968) 15

Van Cauwenberghe v. Biard, 486 U.S. 517 (1988) 21

Zenith Radio Corp. v. United States, 764 F.2d 1577 (Fed. Cir. 1985) 25

STATE CASES

Campaign for Fiscal Equity, Inc. v. State of New York, 179 Misc. 2d 907, 687 N.Y.S.2d 227, *aff'd*, 265 A.D.2d 277, 697 N.Y.S.2d 40 (App. Div. 1999) 25

Campaign for Fiscal Equity v. State of New York, 719 N.Y.S.2d 475, 2001 N.Y. Misc. LEXIS 1 (N.Y. Sup. Ct., Jan. 9, 2001) 12, 27

Marrero v. Commonwealth of Pennsylvania,
559 Pa. 14, 739 A.2d 110 (1999) 3, 27

Marrero v. Commonwealth of Pennsylvania,
709 A.2d 956 (Pa. Cmwlth. 1998) 3, 27

CONSTITUTIONS

U.S. CONST., art. I, §6 12

PA. CONST. art. III, §14 ..... 3, 17

FEDERAL STATUTES AND REGULATIONS

28 U.S.C. §1254(1) 1

28 U.S.C. §1291 ..... 1, 19

28 U.S.C. §1292(b) 11

Title VI of the Civil Rights Act of 1964,
42 U.S.C. §§2000d - 2000d-7 2

34 C.F.R. §100.3(b) 2

STATE STATUTES AND REGULATIONS

Act No. 1997-22 4

Act No. 1998-6A 4

Act No. 1998-46 ..... 3, 4

Act No. 2000-16 3

Act No. 2000-21A 4

Act No. 2001-4 3

Public School Code, 24 P.S. §§1-101 - 27-2702 ..... 3, 4

24 P.S. §5-507 4
24 P.S. §6-672 4
24 P.S. §§25-2502 - 2502.38 4
24 P.S. §2811 ..... 4, 5

351 PA. CODE §12.12-303 4

PROCEDURAL RULES

Fed. R. Civ. P. 24 ..... 1, 24

Fed. R. Civ. P. 26(b)(1) 1

MISCELLANEOUS

7C FEDERAL PRACTICE & PROCEDURE 2d §1920 (1986 & 2000 Supp.) 24

III WORKS OF JAMES WILSON (Andrews ed. 1896) 14

Petitioners respectfully request that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Third Circuit in *Powell et al. v. Ridge*, No. 00-1711 (April 6, 2001) (Appendix A), is published at 247 F.3d 520, 2001 U.S. App. LEXIS 6022. The order of the United States District Court for the Eastern District of Pennsylvania is not reported (Appendix B).

JURISDICTION

This petition is filed within 90 days after the Court of Appeals, following consideration of a petition for rehearing *en banc*, entered its judgment on May 4, 2001 (Appendix C). This Court has jurisdiction under 28 U.S.C. §1254(1). The constitutionality of a statute is not at issue.

STATUTORY PROVISIONS INVOLVED

There are no statutory provisions directly involved in this matter. To the extent that the Third Circuit decision rejects characterization of the order at issue as a collateral order, and alters the right of intervening parties to assert privileges that they may otherwise hold in discovery, the matter tangentially implicates 28 U.S.C. §1291, and Federal Rules of Civil Procedure 26(b)(1) (providing for the assertion of privileges against discovery) and 24 (intervention).

STATEMENT OF THE CASE

A. Factual Background

1. Plaintiffs' complaint

Plaintiffs, a group of parents, organizations, public bodies and public officials concerned with funding for the Philadelphia School District, filed the underlying action in March 1998, against Thomas J. Ridge, Governor of Pennsylvania; Eugene Hickok, Pennsylvania's (then) Secretary of Education; Barbara Hafer, Pennsylvania's Treasurer; and James Gallagher, chair of Pennsylvania's Board of Education ("Executive Branch Officials") (Appendix E).

In their Complaint, plaintiffs assert that public primary and secondary education in Pennsylvania is a "program" subject to the "disparate impact" regulations purportedly promulgated pursuant to Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§2000d - 2000d-7, by the federal Department of Education. *See* 34 C.F.R. §100.3(b). Plaintiffs claim that funding for this "program" uses "criteria and methods that have had the foreseeable effect of subjecting [minority] students to discrimination because of their race, color, or national origin by disproportionately denying them necessary support for their education."

The Complaint is the second action initiated by most of these plaintiffs that seeks to overturn Pennsylvania's statutory system for funding public education. The federal Complaint was filed one week after the Commonwealth Court of Pennsylvania held that a state lawsuit, brought against the Pennsylvania General Assembly and various Pennsylvania Executive and Legislative officials (including

the Speaker of the House and the President *Pro Tempore* of the Senate), raised a non-justiciable political question because the Pennsylvania Constitution vested responsibility for public education solely in the Pennsylvania General Assembly.[1] *See Marrero v. Commonwealth of Pennsylvania*, 709 A.2d 956 (Pa. Cmwlth. 1998).

2. Public education in Pennsylvania

The General Assembly of Pennsylvania is constitutionally directed to "provide for the maintenance and support of a thorough and efficient system of public education to serve the needs of the Commonwealth." PA. CONST. art. III, §14. In a compilation of statutes known as the Public School Code, 24 P.S. §§1-101 – 27-2702, the General Assembly sets the minimum requirements for educational offerings in the Commonwealth and provides a method for funding public education. The Public School Code is amended almost annually in response to the legislature's perceptions of changing education needs.[2]

---

[1] The Commonwealth Court's decision was subsequently affirmed by the Pennsylvania Supreme Court. *See Marrero v. Commonwealth of Pennsylvania*, 559 Pa. 14, 739 A.2d 110 (1999).

[2] Recently, the General Assembly amended the Public School Code to modify the subsidy distribution formulas and address problems of academically-distressed school districts. *See e.g.*, Act No. 2001-4 (which, among other things, provides for (1) business tax credits for contributions to approved, non-profit scholarship or education-improvement organizations; (2) teacher assessment; and (3) establishment of independent schools within school districts); Act No. 2000-16 (which, among other things, sets basic education and special education subsidy formulas and addresses academically-distressed school districts); Act No. 1998-46 (which, among other things, modifies the basic

The Public School Code provides school districts with local taxing authority.[3] 24 P.S. §6-672. Additional funds for public education are provided by annual appropriations to the Pennsylvania Department of Education ("PDE"). *See e.g.*, Act No. 2000-21A.[4] PDE, without the exercise of any independent discretion, distributes appropriated funds to the school districts as directed by statute. *See e.g.*, 24 P.S. §§25-2502 – 25-2503.38 (formulas for basic education subsidy payments for school years 1953-1954 through 1999-2000). The Secretary of Education is authorized to apply "on behalf of the Commonwealth" for federal "grants, appropriations, or

---

education subsidy distribution formula) and Act No. 1997-22 (which provides for the establishment of charter schools).

[3] Because the School Board of the Philadelphia School District is appointed, the Philadelphia School District can only impose taxes authorized by the elected City Council of Philadelphia. *See* 24 P.S. §5-507; 351 PA. CODE §12.12-303.

[4] In 1998, the year this action was initiated, $17,987,740,000 was allocated for operation of Commonwealth government, public debt and public schools. General Appropriation Act of 1998, Act No. 1998-6A. Of this amount, $3,570,188,000 (almost 20% of the Commonwealth's budget) was allocated to the PDE for "payment of basic education funding to schools." *Id.*, section 212 (appropriations to PDE). An additional $3,486,320,000 was allocated to PDE for other educational purposes, including $677,611,000 for special education, $16,723,000 for school food services, and $13,415,000 for performance incentives. *Id.* The funding for PDE ($7,057,020,000) was the largest appropriation. The allocation of the basic education subsidy by PDE to school districts is done in accordance with a statutory formula that, while amended almost yearly, is neutral as to race, color and national origin. *See* 24 P.S. §§25-2502 to 25-2502.38 (formulas since 1953-54).

allocations" that "shall be made available for the aid of education." 24 P.S. §2811.

3. Petitioners

Petitioner Matthew J. Ryan is the Speaker of the Pennsylvania House of Representatives, one house of Pennsylvania's bicameral legislature. Petitioner Robert C. Jubelirer is the President *Pro Tempore* of the Pennsylvania Senate, the other legislative house. Since, under the Pennsylvania Constitution, the General Assembly is responsible for public education in Pennsylvania, any decision in the underlying case here, short of dismissal, will necessarily affect the General Assembly and its members, and, in particular, the duties of Speaker Ryan and Senator Jubelirer, as presiding officers.

Petitioners Jess M. Stairs and James J. Rhoades are, respectively, the chairmen of the committees on education of the Pennsylvania House and Senate. The committees on education, in most instances, give first consideration to any legislative issues related to education in the Commonwealth of Pennsylvania.

B. Proceedings Below

1. Intervention and initial proceedings

The Complaint challenges the statutory funding system established by the General Assembly. In light of their recent experience in state court as defendants in a related action by the same core group of plaintiffs, Legislative Leaders sought to intervene in this federal action for the express purpose of giving "voice to the concerns and arguments" and to "articulate the unique perspective of the

legislative branch of the Pennsylvania government." Appendix F. In their brief in support of intervention, Legislative Leaders explicitly reserved the right to assert the privilege at issue here. *See id.* at 62a. Their motion to intervene was unopposed and was granted by the District Court on June 3, 1998. *Id.* at 77a.

The District Court, ruling on motions by both defendants and intervenors, dismissed the complaint on November 19, 1998. On appeal, the Third Circuit reversed and remanded. *See Powell v. Ridge*, 189 F.3d 387 (3d Cir. 1999). After this Court denied petitions for writs of *certiorari* filed by Executive Branch Officials and Legislative Leaders, *see Ryan v. Powell*, No. 99-527, 528 U.S. 1046 (Dec. 6, 1999) and *Ridge v. Powell*, No. 99-574, 528 U.S. 1046 (Dec. 6, 1999), the District Court entered a scheduling order on January 20, 2000, setting, *inter alia*, a timeframe for discovery.

2. Discovery requests and Legislative Leaders' response

Plaintiffs directed document requests and interrogatories to Legislative Leaders, as well as to the Executive Branch Officials. *See* Appendices G and H. Specifically, Plaintiffs propounded 48 identical production requests and 20 identical interrogatories to each Legislative Leader, seeking information related to school years 1991-92 through 1999-2000.[5] Legislative Leaders responded to

---

[5] In their memorandum in support of their motion to compel, Plaintiffs lumped their document requests into five, sometimes overlapping, categories: (1) "documents reflecting all Commonwealth funding for public education" (requests 10-26); (2) discovery relevant to Plaintiffs' allegation in paragraph 60 of their complaint that defendants "'had knowledge of such

the discovery,[6] objecting to both the production requests and interrogatories on the basis of legislative immunity.[7]

[racially disparate] effects each time prior to taking action which achieved these results'" (requests 7-12); (3) "documents reflecting the nature, extent and distribution of federal funding for public education in Pennsylvania" (requests 27-34); (4) documents "explaining Pennsylvania's system of school finance" and "the local funding portion of the Commonwealth's system of support for public education" (requests 1-6 and 35-37); and (5) documents "designed to begin the process of developing the proof ... that students in Philadelphia are harmed by the discrimination in public school funding" (requests 38-48). Appendix I at 138a-139a. Plaintiffs described their interrogatories as seeking information "that parallels, in great measure, the document requests, but also request specific information [] concerning the factors and information considered in the budgetary process that determined levels of state funding for education since 1991-92." *Id.* at 139a-140a.

[6] Legislative Leaders submitted a joint response to the production requests, Appendix H, and individual responses to the interrogatories. The Response and Objections of Rep. Matthew J. Ryan, which is representative of the responses submitted by the other three Legislative Leaders, appears at Appendix G.

[7] Examples of a document request and an interrogatory that seek information protected by the legislative privilege are document request 9 ("For each school year from 1991-92 through 1999-2000, all documents, including but not limited to memoranda, correspondence, proposals, alternative proposals, models, reports, or updates submitted by or on behalf of any Defendants to ... (b) any member, officer, committee, group, legislator or other person or entity in the Pennsylvania General Assembly concerning funding for public education in Pennsylvania or appropriations for any school district.") and interrogatory 13 ("For each school year from 1991-92 through 1999-2000, identify any and all communications between any defendant and ... (b) any member, officer, committee, group, legislator or other person or entity in the Pennsylvania General

a. Document production

Although objecting on grounds of legislative immunity, Legislative Leaders nevertheless reviewed relevant files and identified two classes of documents responsive to the production requests: documents that were outside the sphere of legislative activity and documents that were within the sphere of legislative activity (as that criterion is used for application of the legislative privilege, *see infra*).

Legislative Leaders produced all documents in the former category. These documents, while concerning matters related to education funding, were created for use external to the legislative process, including such items as press releases, letters to the editor, and talking points for presentations outside the General Assembly.[8]

Legislative Leaders gave Plaintiffs a description of the documents that they would not produce on the basis of the legislative privilege:

> These documents are related to legislative investigations, requests for legislative action, consideration of proposed legislation, and/or evaluation of enacted legislation related, even if indirectly, to funding for public education in

---

Assembly ... concerning (i) any proposed or actual changes in any public education funding formula(s); (ii) the reason(s) for any changes to any public education funding formula(s); and (iii) the anticipated or actual effect(s) or any changes to any public education funding formula(s)"). Appendices G and H.

[8] Copies of the produced documents were part of the Appendix (pages 170a – 225a) filed with the Third Circuit.

> Pennsylvania, as defined by plaintiffs. Included within these documents are: budget requests from the Governor; Department of Education-generated proposals for BEF,[the basic education funding subsidy] special education and other funding, although none are earlier than 1996-97; House and Senate bills and bill amendments concerning education, with bill and amendment analyses by legislative staff; remarks prepared for or made by one or more of the Legislative Leaders on the floor and/or to a committee; memos seeking co-sponsors for legislation, addressing the feasibility of legislation, related to committee meetings and transmitting materials; testimony and materials presented/submitted to legislative committees; documents evaluating and proposing methods for funding public education; and reports and updates sent by PDE to members of the General Assembly relating to various grant programs.

Appendix J.

b. Interrogatories

Legislative Leaders also objected to the interrogatories, because:

> the interrogatories seek information ... that concerns matters within the sphere of legitimate legislative activity (including the investigation, consideration and enactment of legislation related to education funding) and [each Legislative Leader] is protected from having to respond to discovery regarding those matters by the legislative privilege. The legislative privilege also protects [each Legislative

> Leader] against the interference with his duties in connection with and the disruption of the legislative process, which the identification of the requested information and documents would engender.

Appendix G. Notwithstanding their objection, Legislative Leaders responded to eight of the twenty interrogatories as to which they had either no information or information falling outside the sphere of legislative activity.

With respect to the interrogatories concerning public education, each individual Legislative Leader responded that he: (1) has no document retention policy or practice for documents concerning public education (interrogatory 4); (2) maintains no electronic database of information regarding appropriations, revenues, expenditures, racial composition, poverty levels, density levels or performance levels of school districts (interrogatory 5); (3) possesses no data or documents reflecting racial or ethnic composition of school districts in Pennsylvania (interrogatory 6); (4) is aware of no calculation or comparison, outside those in documents filed in connection with this litigation, showing any funding allocations to or the total revenues of school districts with more than 50% minority enrollment or students (interrogatory 7); and (5) has submitted no documents to the federal government under Title VI of the Civil Rights Act and possesses no information concerning such documents (interrogatory 18). Appendix G.

3. Proceedings in the district court

On April 25, 2000, the District Court granted the Plaintiffs' motion to compel Legislative Leaders to respond to the remaining discovery requests ("April 25th order").

Appendix B. Legislative Leaders immediately moved for reconsideration and vacatur of the April 25th order. The District Court, by order dated May 1, 2000, denied that request. Appendix K. On May 12, 2000, Legislative Leaders asked the District Court to amend the April 25th order to include the statement prescribed by 28 U.S.C. §1292(b), which request was denied. On May 31, 2000, Legislative Leaders timely filed a Notice of Appeal to the Third Circuit. Legislative Leaders also petitioned the Third Circuit for a writ of mandamus directed to the District Court ordering it to withdraw the April 25th order.

4. Proceedings in the Third Circuit

On July 31, 2000, the Third Circuit denied Legislative Leaders' petition for writ of mandamus. Appendix L. Thereafter, the appeal in No. 00-1711 was briefed and oral argument held January 18, 2001 before Judges Roth, Barry and Shadur (United States District Court Judge for the Northern District of Illinois, sitting by designation).

On April 5, 2001, the Court dismissed the appeal. A split panel decision was released the following day. Appendix A. The panel majority dismissed the appeal for lack of jurisdiction. Judge Roth (concurring in the judgment) would have found jurisdiction and dismissed on the merits. In the respective decisions to dismiss the appeal, the judges reasoned that legislative immunity was not available as an objection to discovery by legislators who chose to intervene in the underlying action. Legislative Leaders' petition for rehearing *en banc* was denied on May 4, 2001. Appendix C.

REASONS FOR GRANTING THE PETITION

I. THE THIRD CIRCUIT'S DECISION RAISES MATTERS OF NATIONAL IMPORTANCE

This case raises issues of great national importance pertaining to the independence of state legislators and legislatures, the integrity of the state legislative process, and the ability of legislative bodies to protect their interests in litigation which threatens to impact on the accomplishment of legislative duties. Legislators must have the ability to enter the courts when they deem it necessary to protect legal interests as legislators, yet without fear of having adversaries and courts turn their very need for defense of legislative prerogatives into a basis for intrusion into the core legislative process, as the judgment of the Third Circuit does. Unless they can thus act, state legislators risk eventually being confronted with a fait accompli in the form of a court order requiring the alteration of a statutory policy, such as has occurred in New York in the context of public education funding. *See Campaign for Fiscal Equity v. State of New York*, 719 N.Y.S.2d 475, 2001 N.Y. Misc. LEXIS 1 (N.Y. Sup. Ct., Jan. 9, 2001) (ordering legislative changes in funding).

This Court should issue its writ, not just to consider the disruption of legislative activity that is occurring by federal court order in Pennsylvania, but to ensure all state legislators and legislatures, in the course of carrying out their core legislative functions (particularly those, such as education, that are historically the function of the states and not the national government), freedom from interference by private parties engaged in civil litigation in federal courts.

A. Common Law Legislative Immunity

In *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951), this Court recognized a common law legislative immunity for state legislators that protects them, absolutely, from liability for actions undertaken "in the sphere of legitimate legislative activity." *See also Bogan v. Scott-Harris*, 523 U.S. 44 (1998) (unanimously reaffirming the existence of the common law legislative privilege and clarifying its extension to local legislators).

The federal Speech or Debate Clause, which provides immunity for federal legislators, was but a "reflection of political principles already firmly established in the States." *Tenney*, 341 U.S. at 373. The federal Speech or Debate Clause provides that "for any Speech or Debate in either House, [the Senators and Representatives] shall not be questioned in any other Place." U.S. CONST., art. I, §6. Common law legislative immunity is co-extensive in civil matters with that provided members of Congress under the Speech or Debate Clause. *Supreme Court of Virginia v. Consumers Union of the United States*, 446 U.S. 719, 733 (1980).[9]

---

[9] While this Court held in *United States v. Gillock*, 445 U.S. 360 (1980), that the common law legislative privilege did not bar the introduction of evidence concerning a state legislator's support of legislation in a federal criminal action for bribery, this Court has not extended the *Gillock* rationale to civil matters involving state legislators and assertion of the privilege. Notably, *Supreme Court of Virginia* was decided less than three months after *Gillock* and the *Tenney* decision was recently reaffirmed in *Bogan*. To the extent, moreover, that *Gillock* may be read as a limitation on the viability and scope of the common law legislative privilege, recent decisions of this Court undermine the *Gillock* Court's reasoning. *See e.g., New York v.*

Legislative immunity is intended "to preserve the constitutional structure of separate, coequal, and independent branches of government." *United States v. Helstoski*, 442 U.S. 477, 491 (1979). As explained in *Tenney*, "'[i]n order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensibly necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of everyone, however powerful, to whom the exercise of that liberty may occasion offence.'" 341 U.S. at 373 (quoting II WORKS OF JAMES WILSON (Andrews ed. 1896) at 38); *see also Bogan*, 523 U.S. at 52 ("Regardless of the level of government, the exercise of legislative discretion should not be inhibited by judicial interference"). "[T]he privilege was not born primarily of a desire to avoid private suits ... but rather to prevent intimidation by the executive and accountability before a possibly hostile judiciary." *United States v. Helstoski*, 442 U.S. at 491 (quoting *United States v. Johnson*, 383 U.S. 169, 180-81 (1966)) (emphasis added).

Tenney and subsequent cases recognize that the privilege operates to protect the process by which legislation is developed, as opposed to the interests of the individual legislator. The *Tenney* Court's explanation of why the privilege cannot be easily defeated shows this:

> We come then to the question whether from the pleadings it appears that the defendants were acting in the sphere of legitimate legislative activity. ... The claim of an unworthy purpose does not destroy the

---

United States, 505 U.S. 144 (1992); *Printz v. United States*, 521 U.S. 898 (1997).

> privilege. Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. ... The privilege would be of little value if [legislators] could be subjected to the cost and inconvenience and distractions of a trial upon the conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives.

Tenney, 341 U.S. at 377 (emphasis added); *see also Fletcher v. Peck*, 6 Cranch 87, 130 (1810) (not consonant with our scheme of government for a court to inquire into the motives of legislators); *United States v. O'Brien*, 391 U.S. 367, 383-84 (1968) ("[i]nquiries into Congressional motives or purposes are a hazardous matter").

B. Legislative Immunity Extends To Discovery

The absolute legislative immunity recognized in *Tenney* extends beyond protection from liability and the right to be dismissed as a defendant from civil suit. It also provides legislators with protection from "the burden of defending themselves when "engaged 'in the sphere of legitimate legislative activity.'" *Dombrowksi v. Eastland*, 387 U.S. 82, 85 (1967) (quoting *Tenney*, 341 U.S. at 376). A legislator cannot be questioned concerning legislative activities. *See Gravel v. United States*, 408 U.S. 606, 616, 629 (1972) ("[w]e have no doubt that Senator Gravel may not be made to answer – either in terms of questions or in terms of defending himself from prosecution – for the events that occurred at the subcommittee meeting").

Various Courts of Appeals have recognized that the immunity operates not only as immunity from suit, but also as a privilege that protects legislators, and others performing legislative activities, from questioning in any context, including discovery. *See Miller v. Transamerican Press, Inc.*, 709 F.2d 524 (9th Cir. 1983) (allowing former congressman, as non-party deponent, to refuse to answer questions concerning his activities while a legislator); *MINPECO, S.A. v. Conticommodity Services, Inc.*, 844 F.2d 856 (D.C. Cir. 1988) (affirming decision to quash subpoenas issued to custodian of records and congressional subcommittee staff director for information and documents in the subcommittee's possession); *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408 (D.C. Cir. 1995) (affirming decision to quash subpoenas, issued to two members of a congressional subcommittee, for documents stolen from a law firm and provided to the subcommittee); *Burtnick v. McLean*, 76 F.3d 611 (4th Cir. 1996) (noting, in providing instructions on remand, that plaintiff would have to present the case without testimony of board members who abolished plaintiff's job). This "legislative privilege" (sometimes referred to as the "testimonial strand" of the immunity), ensures that the legislative process is, for the good of the public, protected from disruption.[10]

---

[10] This issue - the application of legislative immunity to prohibit certain discovery - was raised as an issue of first impression in the Court of Appeals. It was not addressed by the court, which avoided the issue by focusing instead on the status of Legislative Leaders. *See* Appendix A. Legislative Leaders' assertion of the privilege is premised on the decisions in the Fourth, Ninth and District of Columbia Circuits (and other lower courts) which draw on this Court's decisions in *Dombrowksi* and *Gravel* to interpret the privilege as protecting legislators, and anyone performing legislative functions, from questioning in a discovery context.

C. Federally-Authorized Intrusion Into The Operation Of State Government

The provision and support of public education is traditionally an area of state concern. *See e.g., San Antonio School District v. Rodriguez*, 411 U.S. 1 (1973). In Pennsylvania, it is a constitutional directive to the General Assembly. PA. CONST. art. III, §14. The complaint challenges the statutory-funding mechanism which the General Assembly has put in place, and often amends, to carry out the constitutional directive. Discovery in support of plaintiffs' claim has targeted legislative activity associated with this critical and sensitive state law.

The District Court and now the Third Circuit have authorized a sweeping intrusion into the internal operations of the Pennsylvania General Assembly. The orders of these lower courts pay no heed to the function of the privilege as a bulwark of separation of powers.

The General Assembly of Pennsylvania is always facing education issues. To fulfill the directive of the Pennsylvania Constitution that the General Assembly provide a system of public education to serve the needs of the Commonwealth, each chamber has a standing Education Committee. The Education Committees are charged with investigating education issues, proposing and reviewing education legislation. The Committees frequently conduct public hearings across the Commonwealth on education issues of concern to the Commonwealth's citizens, individuals and businesses. The Chairmen of the Education Committees must not be disrupted in their performance of these core legislative activities by discovery requests for documents and information related to the conduct of these activities, merely (and ironically) because they intervened in

federal litigation to protect their legal interest in carrying out those duties.

The intrusion, moreover, is not limited to the legislators participating in this matter. On the strength of the orders of the lower courts, plaintiffs are expected to expand discovery to target other legislators or staff persons (current or past) involved in the formulation and passage of legislation relevant to public school funding. The potential for disruption to the Pennsylvania General Assembly is enormous. Through their complaint and discovery requests, plaintiffs will have obtained a degree of access to the General Assembly possessed by no other citizen. This result perverts the legislative process and the principles of democratic government. *See Eastland v. United States Serviceman's Fund*, 421 U.S. 491, 503 (1975) ("[a] private civil action may [] be used to delay and disrupt the legislative function").

The impact reaches far beyond this case. It is a prescription for like intrusion into "legislative activity" at every level of government of each of the fifty states, as well as the District of Columbia, Puerto Rico, the United States Virgin Islands and other governments operating under the auspices of the United States Constitution. This Court should clarify that the legislative immunity extends to discovery, regardless of the status of the assertor with respect to the underlying action, so as to prevent such intrusion.

II. THE THIRD CIRCUIT DECISION CONFLICTS WITH DECISIONS OF THIS COURT AND ALL OTHER CIRCUITS, INCLUDING THE THIRD CIRCUIT, WHICH RECOGNIZE THAT AN ORDER DENYING IMMUNITY IS A COLLATERAL ORDER SUBJECT TO IMMEDIATE APPEAL

The collateral order doctrine, enunciated by this Court in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949), provides an exception to the general rule that orders which are not final under 28 U.S.C. §1291 will not support appellate jurisdiction. It permits appeal of "those district court decisions that are conclusive, that resolve important questions completely separate from the merits, and that would render such important questions effectively unreviewable on appeal from final judgment in the underlying action." *Digital Equipment Corp. v. Desktop Direct*, 511 U.S. 863, 867 (1994) (citing *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978)). Immediate appeal for this "small class" of orders is appropriate because the "rights asserted [are] too important to be denied review." *Behrens v. Pelletier*, 516 U.S. 299, 305 (1996) (citing *Cohen*, 337 U.S. at 546).

This Court and all of the Courts of Appeal, including the Third Circuit, recognize that orders denying legislative or other forms of immunity asserted by government officials are appealable collateral orders.[11] *See e.g. Helstoski v. Meanor*, 442 U.S. 500 (1979) (claim of absolute immunity

---

[11] The Third Circuit also entertains appeals from discovery orders qualifying as collateral orders. *See e.g., In re Ford Motor Company*, 110 F.3d 954 (3d Cir. 1997) (asserting jurisdiction to review order denying claim of attorney-client privilege); *Bacher v. Allstate Ins. Co.*, 211 F.3d 52 (3d Cir. 2000) (same).

under the Speech or Debate Clause by Congressman); *Nixon v. Fitzgerald*, 457 U.S. 731 (1982) (claim of absolute immunity by president); *Mitchell v. Forsyth*, 472 U.S. 511 (1985) (claim of qualified immunity by former attorney general); *Larsen v. Senate of the Commonwealth of Pennsylvania*, 152 F.3d 240 (3d Cir. 1998) (claim of absolute legislative privilege by state supreme court justices).[12] Each of these immunities have, as their essence, the entitlement not only not to stand trial and but also to avoid the burdens of such pretrial matters as discovery. *See*

---

[12] *See also Agromayor v. Colberg*, 738 F.2d 55 (1st Cir. 1984) (order denying state legislator's absolute immunity defense immediately appealable); *Goldberg v. Town of Rocky Hill*, 973 F.2d 70 (2d Cir. 1992) (referencing collateral order doctrine and affirming denial of legislative immunity defense on the merits); *Bines v. Kulaylat*, 215 F.3d 381, 384 (3d Cir. 2000) ("There is no question that orders denying absolute immunity are reviewable on interlocutory appeal."); *Front Royal & Warren County Indus. Park v. Town of Front Royal*, 865 F.2d 77 (4th Cir. 1989) (order striking town's absolute immunity defense immediately appealable); *Liberty Mutual Ins. Co. v. Louisiana Dept. of Ins.*, 62 F.3d 115 (5th Cir. 1995) (discovery order that implicitly denied state rate commissioner's claim of legislative immunity immediately appealable); *Prince v. Hicks*, 198 F.3d 607 (6th Cir. 1999) (order denying state prosecutors' assertion of absolute immunity immediately appealable); *Auriemma v. Montgomery*, 860 F.2d 273 (7th Cir. 1988) (order denying municipal attorney's claim of absolute immunity immediately appealable); *Brown v. Griesenauer*, 970 F.2d 431 (8th Cir. 1992) (order denying absolute immunity to alderman immediately appealable); *Chateaubriad v. Gaspard*, 97 F.3d 1218 (9th Cir. 1996) (order denying state legislator's claim of legislative immunity immediately appealable); *Anthony v. Baker*, 955 F.2d 1395 (10th Cir. 1992) (order denying absolute immunity to deputy sheriff immediately appealable); *Ellis v. Coffee County Bd. of Registrars*, 981 F.2d 1185 (11th Cir. 1993) (order denying absolute immunity to county commissioners immediately appealable).

Behrens, 516 U.S. at 308; *see also Lauro Lines S.L.R. v. Chasser*, 490 U.S. 495, 499-500 (1989); *Van Cauwenberghe v. Biard*, 486 U.S. 517, 523-25 (1988).

In *Helstoski v. Meanor*, this Court held that an order denying Speech or Debate immunity would be directly and immediately appealable to the court of appeals. Using its rationale from *Abney v. United States*, 431 U.S. 651 (1977) (order denying a claim of double jeopardy was an appealable collateral order), this Court explained in *Helstoski* that the important right afforded by the Speech or Debate Clause would be "significantly undermined" if appellate review were postponed. 442 U.S. at 507. As "the Speech or Debate Clause was designed to protect Congressmen, 'not only from the consequences of litigation's results but also from the burden of defending themselves,' ... if a Member [of the legislature] 'is to avoid exposure to [being questioned for acts done in either House] and thereby enjoy the full protection of the Clause, his ... challenge to the indictment must be reviewable before ... exposure [to trial] occurs.'" 442 U.S. at 508 (citing *Dombrowski*, 387 U.S. at 85 and *Abney*, 431 U.S. at 662) (brackets and ellipsis in the original).

Legislative Leaders asserted legislative immunity as an objection in response to the discovery requests. The Third Circuit erred once by not recognizing the nature of the privilege asserted, and twice, by conflating its analysis of jurisdiction with the merits of the assertion. The merits of the immunity claim are irrelevant because, as this Court has explained, whether an order qualifies as a collateral order "must be determined by focusing upon the *category of order appealed from*; ... [a]ppeal rights cannot depend on the facts of a particular case." *Behrens*, 516 U.S. at 311 (emphasis added). *See also Cohen*, 377 U.S. at 546 (referring to "small

class" of orders). It is also axiomatic that a federal court must determine and find jurisdiction before addressing the merits. *See e.g., Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998) (rejecting as contrary to fundamental principles of separation of powers the growing use of "hypothetical jurisdiction" under which courts of appeals would first address and dismiss on the merits in order to avoid a difficult question of jurisdiction).

III. THE THIRD CIRCUIT'S DECISION CONFLICTS WITH BASIC LEGAL PRINCIPLES, PRECEDENT OF THIS COURT, AND DECISIONS OF OTHER CIRCUITS, INCLUDING THE THIRD CIRCUIT, AND PRESENTS AN IMPORTANT FEDERAL QUESTION

The Third Circuit's erroneous conclusion that Legislative Leaders' intervention resulted in a waiver of their right to assert legislative immunity evidences a misunderstanding of legislative immunity, of intervention, and of the realities of litigation that targets decision-making by a state legislature.[13] Because it interpreted the immunity to protect legislators from the disruption only of suit, the Third Circuit reasoned that Legislative Leaders must have renounced the privilege by intervening. As explained above, however, legislative immunity is more than a privilege to avoid suit; it is a privilege not to be questioned about legislative activities.

---

[13] The majority of the Third Circuit panel, by refusing to apply the collateral order doctrine because Legislative Leaders had not raised a "traditionally recognized privilege," implied that the privilege had been waived by the act of intervention. The concurring judge explicitly found such a waiver.

A. Waiver of Legislative Immunity

The Third Circuit's refusal to recognize legislative immunity runs afoul of this Court's decision in *United States v. Helstoski*, 442 U.S. 477 (1979). In *Helstoski*, assuming that even if a waiver of Speech or Debate immunity could ever occur, this Court cautioned that such waiver of this critical right could be found "only after explicit and unequivocal renunciation of the protection." *Id.* at 491 (emphasis added). The stringent test set forth by this Court in *Helstoski* respects the status of the privilege as a bulwark of separation of powers.

No such 'explicit and unequivocal' renunciation of the privilege's protection occurred here. Legislative Leaders intervened in this action for the express purpose of protecting their rights, a bundle which includes legislative immunity. Their position on immunity is entirely consistent with their desire to give "voice to the concerns and arguments" and to "articulate the unique perspective of the legislative branch of the Pennsylvania government."[14] The immunity and the legislative activity it protects is of the utmost concern to these leaders of the Pennsylvania General Assembly.

---

[14] The difficulty a legislature faces in meeting disparate needs, and the deference it should receive from the courts as to the performance of its policy choices, are examples of the issues that intervenors would want the district court to consider. These are public policy principles that do not require discovery into the workings of the legislature by litigants but that are often overlooked by non-legislative parties, even in the executive branch of government.

B. An Intervenor Becomes A Party To The Litigation

The basic principle offered by the Third Circuit in support of its decision - that a privilege otherwise assertable against discovery can be waived by the act of intervention - is flawed, and threatens to impact far beyond the present matter.

It is a tenet of civil practice and procedure that once intervention is granted, the intervenor becomes a full participant in the lawsuit and is treated as if it were an original party.[15] *See e.g., Schneider v. Dumbarton Developers, Inc.*, 767 F.2d 1007, 1017 (D.C. Cir. 1985) (stating this general rule); Wright, Miller & Kane, 7C FEDERAL PRACTICE & PROCEDURE 2d §1920 (1986 & 2000 Supp.). The rights of the intervening party, unless subject to restrictions crafted by the district court at the time of intervention, are entitled to as much judicial protection as the rights of the original parties.[16]

The inquiry to determine whether the legislative privilege applies - i.e., whether it is being asserted in connection with activities undertaken within the "sphere of legitimate legislative activity" - focuses on the activity

---

[15] The present situation is to be distinguished from one in which a party intervenes for the express purpose of protecting a privilege. In those situations, the privilege is typically the legal interest that supports intervention under Fed. R. Civ. P. 24. Here, Legislative Leaders had legal interests that included, but were not limited to, the legislative privilege.

[16] The only generally-recognized limitation on an intervenor's ability to protect its rights is a prohibition against questioning venue.

giving rise to the protected information, not on the status of the assertor. It matters not whether the assertor is a plaintiff, defendant, intervenor, non-party or even expert witness. What matters is whether the activity in which the assertor was, or is, engaged is a "core legislative activity." *See e.g., Gravel*, 408 U.S. 606 (legislative privilege barred testimony of non-party senate aide concerning his contacts with Senators); *Campaign for Fiscal Equity, Inc. v. State of New York*, 179 Misc.2d 907, 687 N.Y.S.2d 227, *aff'd*, 265 A.D.2d 277, 697 N.Y.S.2d 40 (App. Div. 1999) (legislative immunity protected expert witness from questioning related to contacts with legislators and legislative aides during formulation of computer models for state funding of public schools).

With its focus on the activity that generated the information alleged to be protected, the legislative privilege is akin to other privileges routinely asserted by someone other than an original party to the action. Waiver of a privilege is typically a function of affirmatively putting the privilege at issue, such as where a client sues his or her prior attorney. Courts have not held, and the Third Circuit was unable to cite any supporting case law, that the act of intervening is alone sufficient to waive a privilege.[17]

If this theory of waiver is accepted, there would be no principled way for it not to be applied to federal

---

[17] In an analogous context, courts have held that the federal government, by instituting suit as a plaintiff, does not automatically waive its right to assert the work-product and deliberative-process privileges. *See e.g., Zenith Radio Corp. v. United States*, 764 F.2d 1577, 1580 (Fed. Cir. 1985) ("These privileges involve subtle and sensitive questions and ordinarily should not be breached without a more penetrating analysis than the automatic waiver rule involves.").

officials who might voluntarily choose to intervene in this or a similar case. For example, if the United States Secretary of Education were to voluntarily intervene, he would do so at the risk of being deemed to have waived the deliberative process privilege and other available governmental privileges.

C. Importance To State Government

There is a dangerous and misguided perception at work in the underlying proceedings. The Third Circuit's reasoning shows a belief that Legislative Leaders' intervention (and their assertion of legislative immunity in response to discovery) was for the sole purpose of impeding the proceedings. However, to premise waiver of legislative immunity on voluntary intervention based on this misguided perception fails to account for Legislative Leaders' legitimate and legal interest in the subject matter of the suit and their broader interest in protecting the legislative process.

The Third Circuit's reasoning would result in relegating the true target of this civil complaint to the sidelines. While individual officials in the executive branch of state government have been sued, the legal interests of the legislative branch are far more directly involved and may not be as vigorously protected by the executive branch. With respect to the funding system for public education at issue here, the duties of the executive branch are statutory and ones over which they have little to no discretion. With respect to the bulk of the Commonwealth-treasury funds designated to the support of public school education, the executive branch has only the ministerial task of distributing the funding according to statutory formula.

The General Assembly, on the other hand, is directed by the Pennsylvania Constitution to maintain a system of public education to serve the needs of the Commonwealth, an activity that implicates a myriad of policy concerns and budgetary decisions. The Third Circuit's reasoning on waiver is short-sighted when considered against the realities of the situation. It forces legislators to risk either a fait accompli in the form of a court order requiring action that can only be accomplished by legislation (such as occurred in New York in *Campaign for Fiscal Equity v. State of New York, supra*) if they do not intervene or disruption of the core legislative process by multiple discovery requests if they do.

Neither Legislative Leaders, nor the citizens of Pennsylvania, should be penalized for the Legislative Leaders' vigorous defense of this case given the constitutional obligation of the General Assembly of Pennsylvania to fashion a system of public education to meet the needs of the Commonwealth. This obligation does not exist in a vacuum but rather must be balanced with all the other obligations and responsibilities of the legislative branch of a state government to its citizens. Just as they defended themselves and their institution in the *Marrero* case in state court, where the same core plaintiffs also challenged the statutory system for funding public education, Legislative Leaders chose to participate in the underlying suit because of the grave consequences any decision other than dismissal would have on the General Assembly and its members.

The protection of legislative activities from discovery by the assertion of legislative immunity is not inconsistent with participation in this lawsuit. The federal

judiciary should be chary of permitting any deterrent to the uninhibited discharge of core legislative duties by state legislators.

CONCLUSION

For the reasons developed above, the Court should grant this petition for a writ of *certiorari*.

Respectfully submitted,

JOHN P. KRILL, JR. (*counsel of record*)
LINDA J. SHOREY
JULIA M. GLENCER

Counsel for Petitioners

(2)

Supreme Court, U.S.

001854 JUN 12 2001

No. _____

OFFICE OF THE CLERK

SUPREME COURT OF THE UNITED STATES

MATTHEW J. RYAN; ROBERT C. JUBELIRER;
JESS M. STAIRS AND JAMES J. RHOADES,

Petitioners,

v.

DAVID POWELL, et al.

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

JOHN P. KRILL, JR. *(Counsel of Record)*
LINDA J. SHOREY
JULIA M. GLENCER

KIRKPATRICK & LOCKHART LLP
240 NORTH THIRD STREET
HARRISBURG, PENNSYLVANIA 17101
(717) 231-4500
Counsel for Petitioners

June 12, 2001

163 pp

TABLE OF CONTENTS

Appendix A – April 5, 2001, Opinion and Order of the United States Court of Appeals for the Third Circuit dismissing the appeal for lack of jurisdiction 1a

Appendix B – April 25, 2000, Order of the United States District Court for the Eastern District of Pennsylvania granting Plaintiffs' motion to compel discovery from Legislative Leaders 23a

Appendix C – May 4, 2001, Order of the United States Court of Appeals for the Third Circuit, denying Legislative Leaders Petition for Rehearing *En Banc* 24a

Appendix D – May 11, 2001, Mandate issued from the United States Court of Appeals for the Third Circuit 26a

Appendix E – Complaint by Plaintiffs Powell et. al., dated March 10, 1998, filed in the United States District Court for the Eastern District of Pennsylvania 27a

Appendix F – Motion for Leave to Intervene of Matthew J. Ryan, Robert C. Jubelirer, Jess M. Stairs, and James J. Rhodes, dated May 5, 1998; Brief in Support of the Motion for Leave to Intervene; and June 3, 1998 Order of the United States District Court for the Eastern District of Pennsylvania granting uncontested Motion for Leave to Intervene 61a

Appendix G – Defendant-Intervenor Representative Matthew J. Ryan's Reponses & Objections to Plaintiff School District of Philadelphia's First Set of Interrogatories, dated March 29, 2000 ..... 78a

Appendix H – Legislative Leaders Reponses & Objections to Plaintiffs' First Set of Requests for Production of Documents, dated February 22, 2000 .....97a

Appendix I – Excerpts from Memorandum in Support of Plaintiff's Motion to Compel Discovery from Legislative Leaders, dated April 6, 2000 .....137a

Appendix J – March 24, 2000 letter from counsel for Legislative Leaders to counsel for Plaintiffs re: documents withheld under claim of legislative privilege 145a

Appendix K – May 1, 2000, Order of the United States District Court for the Eastern District of Pennsylvania denying Legislative Leaders' Motion for Reconsideration and Vacatur 149a

Appendix L – July 31, 2000 Order of the United States Court of Appeals for the Third Circuit denying Legislative Leaders' Petition for a Writ of Mandamus 151a

Appendix M – Federal Rule of Civil Procedure 26 .....152a

Appendix N - Federal Rule of Civil Procedure 24 .....153a

Appendix O – Section 100.3 of Title 34 of the Code of Federal Regulations 155a

Appendix P – Section 6 of Article I of the United States Constitution; Section 14 of Article III of the Constitution of the Commonwealth of Pennsylvania; Section 15 of Article II of the Constitution of the Commonwealth of Pennsylvania 160a

APPENDIX A

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 00-1711

DAVID POWELL; SHELEAN PARKS; PATRICE EVERAGE; JULIA A. DAVIS; YVETTE BLAND; GERALDINE NEWTON; MARIA M. RIVERA; MARY E. MILLER; GREGORY LUZAK; CATHERINE LUZAK; FU ZHEN XIE; BLACK CLERGY OF PHILADELPHIA AND VICINITY; PHILADELPHIA BRANCH NAACP; ASPIRA, INC. OF PENNSYLVANIA; PARENTS UNION FOR PUBLIC SCHOOLS; CITIZENS COMMITTEE ON PUBLIC EDUCATION IN PHILADELPHIA; PARENTS UNITED FOR BETTER SCHOOLS, INC.; DAVID W. HORNBECK, SUPERINTENDENT, The School District of Philadelphia; FLOYD W. ALSTON, PRESIDENT, Board of Education of the School District of Philadelphia; BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF PHILADELPHIA; THE SCHOOL DISTRICT OF PHILADELPHIA; EDWARD G. RENDELL, MAYOR, City of Philadelphia; CITY OF PHILADELPHIA

PHILADELPHIA FEDERATION OF TEACHERS LOCAL 3; TED KIRSCH, PRESIDENT, GUARDIAN AD LITEM,

Intervenors in D.C.

v.

THOMAS J. RIDGE, Governor of the Commonwealth of Pennsylvania; JAMES P. GALLAGHER, DR., Chairperson Commonwealth of Pennsylvania State Board of Education; EUGENE W. HICKOK, DR., Secretary of Education; BARBARA HAFER, Treasurer;

MATTHEW J. RYAN; ROBERT C. JUBELIRER; JESS M. STAIRS; JAMES J. RHOADES,

Intervenors in D.C.,
Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA
D.C. Civil No. 98-CV-1223
District Judge: The Honorable Herbert J. Hutton

Argued: January 18, 2001

Before: ROTH, BARRY, *Circuit Judges* and SHADUR* *District Judge*

OPINION OF THE COURT

BARRY, Circuit Judge:

Appellants suggest that we recognize a form of legislative immunity heretofore unknown in the law, one which can best be described as "partial legislative immunity." Thus, and it is not disputed, the immunity

---

* The Honorable Milton I. Shadur, United States District Judge for the Northern District of Illinois, sitting by designation.

appellants assert would enable them to seek discovery, but not respond to it; take depositions, but not be deposed; and testify at trial, but not be cross examined. Moreover, appellants presumably believe that when they come upon an aspect of the litigation they find disagreeable, as they find the discovery order at issue here to be, they will be able to pursue an interlocutory appeal in this Court. We disagree, and will dismiss this interlocutory appeal for lack of jurisdiction.

I.

In March 1998, suit was filed by students and parents, organizations, school district and city officials of the City of Philadelphia, and the City itself (hereinafter "appellees") alleging that the formula used by the Commonwealth of Pennsylvania to allocate certain federal education monies violated the regulations adopted by the U.S. Department of Education implementing Title VI of the Civil Rights Act, 42 U.S.C. §§2000d-2000d-7. *See* 34 C.F.R. § 100.3(b). More specifically, the complaint alleged that the Commonwealth's criteria and methods of funding public education yield racially discriminatory results in Philadelphia and other predominantly minority school districts. Injunctive and declaratory relief was sought against members of the state's executive branch, including the Governor, the Secretary of Education, the State Treasurer, and the Chair of the State Board of Education.

In early May 1998, several leaders of the Pennsylvania General Assembly (the "Legislative Leaders") moved to intervene in the suit, citing their financial and legal interests in the litigation and the need to "articulate to the Court the unique perspective of the legislative branch of the Pennsylvania government." App.

at 48a.[1] That motion was unopposed, and was granted by the District Court. In their brief in support of intervention, the Legislative Leaders explicitly concurred in the motion to dismiss filed by the executive department defendants two days earlier; shortly thereafter, the legislators filed their own motion to dismiss or for judgment on the pleadings; and shortly after that, they filed yet another motion for judgment on the pleadings. The District Court dismissed the complaint for failure to state a claim. We reversed, emphasizing that the validity of appellees' claims could be tested only on a developed record and rejecting the Legislative Leaders' argument that plaintiffs lacked standing to maintain each count of their complaint. *Powell v. Ridge,* 189 F.3d 387 (3d Cir. 1999). Notably, we did not mention legislative immunity, be it partial or absolute, because it was, at least at that time, a non-issue. The Legislative Leaders and the executive branch defendants filed separate petitions for *certiorari* to the Supreme Court of the United States. Both petitions were denied. *Ryan v. Powell,* 528 U.S. 1046 (1999); *Ridge v. Powell,* 528 U.S. 1046 (1999).

The District Court, taking the cue from us, thereafter entered a scheduling order and appellees accordingly sought discovery from all defendants, both executive and legislative. The Legislative Leaders objected, asserting, for the first time, "legislative privilege." After a meeting between counsel for both sides, however, the Legislative Leaders agreed to search their files to determine what documents they possessed which would fall under the discovery requests. Ultimately they reported finding two boxes of documents, only 56 pages of which they deemed

---

[1] The then-proposed intervenors referred to immunity only in passing when they stated, in a footnote in their brief, that they do not waive any "speech or debate immunity" they may have. App. at 37a.

to be not privileged. Appellees then filed a Motion to Compel, which was granted, although because of a miscommunication between counsel, the Legislative Leaders' response to the motion was not received until after the District Court entered its order. That response, which included a multitude of objections to the discovery requests including "legislative privilege," was, however, considered by the Court in connection with the Legislative Leaders' motion for reconsideration. The Court gave the objections short shrift, finding that our prior decision stressed the "importance of Plaintiffs' ability to conduct discovery" and, in light of this "mandate," denied the motion for reconsideration. The Legislative Leaders have now appealed the order granting the Motion to Compel.[2]

II.

"As a general rule, discovery orders are not final orders of the district court for purposes of obtaining appellate jurisdiction under 28 U.S.C. § 1291. " *In re Ford Motor Co.*, 110 F.3d 954, 958 (3d Cir. 1997) (citing *Hahnemann Univ. Hosp. v. Edgar*, 74 F.3d 456, 461 (3d Cir. 1996)). The collateral order doctrine excepts from this

---

[2] Appellees contend that the Legislative Leaders should have appealed the denial of their Motion for Reconsideration rather than the order granting the Motion to Compel. Without pausing to decide that issue, we note that "decisions on the merits are not to be avoided on grounds of technical violations of procedural rules," *Polonski v. Trump Taj Mahal Associates*, 137 F.3d 139, 144 (3d Cir. 1998), *cert. denied*, 525 U.S. 823 (1996). This Court will exercise appellate jurisdiction over orders not specified in the notice of appeal where "(1) there is a connection between the specified and unspecified orders; (2) the intention to appeal the unspecified order is apparent; and (3) the opposing party is not prejudiced and has a full opportunity to brief the issues." *Id.* (citations and internal quotations omitted). Each of those conditions is met here.

prohibition a narrow range of interlocutory decisions. *In* re *Montgomery County,* 215 F.3d 367, 373 (3d Cir. 2000) (citing *Cohen v. Beneficial Indus. Loan Corp.,* 337 U.S. 541 (1949)). To come within the doctrine, an interlocutory decision must conclusively determine the disputed issue, the issue must be completely separate from the merits of the action, and the decision must be effectively unreviewable on appeal from a final judgment. *Id.* (citing *Coopers & Lybrand v. Livesay,* 437 U.S. 463, 468 (1978)).

Just recently, in *Bacher v. Allstate Ins. Co.,* 211 F.3d 52 (3d Cir. 2000), we discussed the applicability of the collateral order doctrine to discovery orders. In *Bacher,* the defendant insurance carrier contended that "sensitive" information regarding previous settlements ought to be privileged from discovery. *Id.* at 55. We found that in light of *Cunningham v. Hamilton County,* 527 U.S. 198 (1999), *Digital Equipment Corp. v. Desktop Direct, Inc.,* 511 U.S. 863 (1994), and the approach taken by other courts of appeals - which, we noted, prohibit immediate review of discovery orders even when privilege issues are involved - the collateral order doctrine does not reach appeals of discovery orders "beyond the narrow categories of trade secrets and *traditionally recognized privileges,* such as attorney-client and work product." *Bacher,* 211 F.3d at 57 (emphasis added).[3] Underlying these narrow

---

[3] We even more recently examined an interlocutory appeal of a discovery order in *Pearson v. Miller,* 211 F.3d 57 (2000). Writing only a few days after the *Bacher* decision, we found jurisdiction under the collateral order doctrine. *Id.* at 64-65. *Pearson* is clearly distinguishable from what is at issue here. The information sought in *Pearson* was confidential and the privilege asserted was based upon specific confidentiality provisions of three state statutes. *Id.* at 62-63. The Legislative Leaders, by contrast, do not assert a privilege under state law nor any interest in confidentiality.

exceptions to the general rule of non appealability is a concern that where confidential information is sought, there is no way, absent immediate appeal of the order requiring disclosure, to 'unscramble the egg scrambled by the disclosure." *Ford,* 110 F.3d at 963. It bears mention that even if legislative immunity in its traditionally recognized form were similarly bottomed on confidentiality, which it is not, the Legislative Leaders explicitly disavow any such interest.

It is beyond argument that absolute legislative immunity represents a traditionally recognized privilege, and orders denying legislative immunity have often been reviewed under the collateral order doctrine. Absolute immunity, after all, creates not only protection from liability, but also a right not to stand trial. *Montgomery County,* 215 F.3d at 373 (citing *Mitchell v. Forsyth,* 472 U.S. 511, 525 (1985)). "Thus, interlocutory review of the Appellants' absolute immunity claims is necessary to preserve the protections such immunity affords." *Id.* In light of such clear case law, the jurisdictional hurdle discussed in *Bacher* would not stand in the way of a legislator asserting facts giving rise to a colorable claim of legislative immunity.

This is not such a case. Although *Bacher* found that the collateral order doctrine "should apply to broad categories of interlocutory orders, without concern for the individual circumstances of particular cases," *Bacher,* 211 F.3d at 56 (citing *Digital Equipment,* 511 U.S. at 868), the Legislative Leaders stray far beyond the bounds of traditional legislative immunity, territory they surely recognize. Legislative immunity, they explain, is a doctrine which "protects state legislators absolutely from liability for their legislative activities. It also provides legislators with protection from the burden of defending

themselves when engaged in, the sphere of legitimate legislative activity." Appellants' Br. at 14-15 (citations and internal quotations omitted). Furthermore, they add, legislative immunity "protects against disruption to the legislative process, which civil discovery invariably precipitates." *Id.* at 44, n.14. All of this, of course, is correct.

Despite their understanding of legislative immunity's broad parameters, however, the Legislative Leaders are not seeking immunity from this suit which, it must be remembered, they voluntarily joined. Nor are the Legislative Leaders seeking any kind of wholesale protection from the burden of defending themselves. Instead, the Legislative Leaders build from scratch a privilege which would allow them to continue to actively participate in this litigation by submitting briefs, motions, and discovery requests of their own, yet allow them to refuse to comply with and, most likely, appeal from every adverse order. As we noted at the outset, and as the Legislative Leaders conceded at oral argument, the privilege they propose would enable them to seek discovery, but not respond to it; take depositions, but not be deposed; and testify at trial, but not be cross-examined. In short, they assert a privilege that does not exist.

Not surprisingly, the Legislative Leaders have failed to come up with even one case which hints at the existence of the privilege they press. Moreover, every case which they do cite to support this privilege features, in direct contrast to this case, a defendant or a target of a subpoena seeking to extricate himself or herself *completely* from various legal entanglements. *See, e.g., Burtnick v. McLean,* 76 F.3d 611 (4th Cir. 1996); *Brown & Willamson Tobacco Corp. v. Williams,* 62 F.3d 408 (D.C. Cir. 1995); *MINPECO, S.A. v. Conticommodity Services, Inc.,* 844

F.2d 856 (D.C. Cir. 1988); *Miller v. Transamerican Press, Inc.*, 709 F.2d 524 (9th Cir. 1983); *2BD Assoc. Limited v. County Commissioners for Queen Anne's Co.*, 896 F. Supp. 528 (D. Md. 1995); *Marylanders for Fair Representation, Inc. v. Schaefer*, 144 F.R.D. 292 (D. Md. 1992); *Campaign for Fiscal Equity v. New York*, 179 Misc. 2d 907 (N.Y. Sup. Ct. 1999).

Unlike the reluctant participants in the cases upon which they rely, the Legislative Leaders voluntarily installed themselves as defendants. And, unlike the reluctant participants in those cases, the Leaders wish to remain as defendants and participate as long as this case is around; at no time, we note, have they invoked legislative immunity as a basis for any of their various motions to dismiss. This is simply not a case of legislators caught up in litigation in which they do not wish to be involved. Rather, these are self-made defendants who seek to turn what has heretofore been the shield of legislative immunity into a sword.

A proper invocation of legislative immunity would typically call for the dismissal of a legislator from the lawsuit. Cases cited by the parties abound with examples of this complete remedy rather than the piecemeal remedies sought here. *See, e.g., Supreme Court of Virginia v. Consumers Union of the United States*, 446 U.S. 719, 733-34 (1980) (stating that if legislative immunity applied, "defendants in that suit could successfully have sought *dismissal* on the grounds of absolute legislative immunity") (emphasis added); *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 511 n.17 (1975) (while immunity does not absolve legislators of the responsibility of filing a motion to *dismiss*, such motions must be swiftly resolved); *Powell v. McCormack*, 395 U.S. 486, 505-06 (1969) (citing prior cases in which the Court dismissed actions against

members of Congress under the protection of the Speech and Debate Clause); *Mitchell,* 472 U.S. at 525 ("the essence of absolute immunity is its possessor's entitlement not to have to answer for his conduct in a civil damages action."); *Larsen v. Senate of the Commonwealth,* 152 F.3d 240, 254 (3d Cir. 1998) (legislators' motion to dismiss granted for acts taken in legislative capacity).

Not only is dismissal of the legislator the logical and eminently appropriate result where legislative immunity applies, it also is the remedy which best furthers the underlying goals of the doctrine. As we have observed, "[l]egislative immunity must be applied pragmatically, and not by labels. Thus, without attempting to draw a line for all cases, we examine whether [the] request for prospective relief [can] be accorded consistent with the policies underlying legislative immunity." *Larsen,* 152 F.3d at 253. We, too, need not attempt to set out the precise parameters of legislative immunity for cases yet to come. We find it manifestly clear, however, that *absolute* legislative immunity was at the heart of cases such as *Larsen.* The privilege described by the Legislative Leaders would not protect them absolutely from the burdens of this litigation and, therefore, is outside the bounds of traditional legislative immunity. "Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good." *Tenney v. Brandhove,* 341 U.S. 367, 377 (1951). *See also United States v. Brewster,* 408 U.S. 501, 517 (1972) (shield of legislative immunity "does not extend beyond what is necessary to preserve the integrity of the legislative process"); *United States v. Nixon,* 418 U.S. 683, 710 (1974) (cautioning that privileges "are not lightly created nor expansively construed").

The opinion concurring in the judgment only because, in its view, *Larsen* establishes our jurisdiction, would open the doors of our Court, albeit briefly, where the "privilege" invoked has, in the words of the distinguished author of that opinion, "no basis in law" and has "never been recognized by this, or any other, court" Conc. Op. at 13. Those doors must open, in her view, because we cannot in the course of our jurisdictional analysis even peek to see whether we are presented with a traditionally recognized privilege as that would involve touching on the merits. But if this view were to prevail, *Bacher* would be rendered meaningless; indeed, a confined examination of at least certain underlying facts was necessary in *Bacher* and would inevitably be necessary in applying *Bacher*. In any event, it appears that, under the concurring opinion itself, a peek at the merits would be in order, for it concludes that our collateral order jurisdiction is triggered by calling the privilege "'legislative' ... in a case involving legislators acting in a legislative capacity," Conc. Op. at 14, a paradigm merits determination.

Because the purported privilege the Legislative Leaders invoke is assuredly not only not "traditionally recognized," but is not even suggested by any reasonable reading of the applicable case law, *Bacher* requires that we dismiss this interlocutory appeal for lack of jurisdiction.[4] We note that, as in any civil case, the Legislative Leaders remain protected by the District Court's power to limit

---

[4] The corollary to our finding of no jurisdiction under *Bacher* is that the Legislative Leaders have not, at least as of yet, invoked absolute legislative immunity. Neither the District Court nor this Court, therefore, has been presented with the question - and, given our lack of jurisdiction, we do not decide - whether such immunity would be available to voluntary intervenors such as the Legislative Leaders, or whether the very act of intervening has waived the privilege.

discovery which is unreasonably cumulative, more easily obtainable from another source, or unduly burdensome. Fed. R. Civ. Proc. 26(b)(2).

ROTH, Circuit Judge, *Concurring:*

I agree with the Majority that the asserted legislative immunity from discovery has no basis in law and must be denied. The immunity asserted is unprecedented in its scope and breadth. The four Legislative Leaders, who knowingly and voluntarily intervened as defendants in this litigation and wish to remain as such, argue that they should enjoy all the rights associated with being parties to federal litigation while bearing none of the burdens or responsibilities. I have found nothing to support the idea that a state legislator who remains a party to civil litigation is immune from compliance with discovery. Indeed, not only has such a privilege never been recognized by this, or any other, court, but it might conceivably violate an opposing party's due process rights were we to recognize it.

In my view, however, the lack of merit in the Legislative Leaders' claim of immunity does not mean, as the Majority holds, that we do not have jurisdiction to hear the appeal under the Collateral Order Doctrine of *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949), and its progeny. Rather, the lack of merit means that the claim of immunity should be denied for just that reason - it lacks merit. It is established law in this Circuit that the denial of a claim of legislative immunity is immediately reviewable under *Cohen. See Larsen v. Senate of* the *Commonwealth of Pennsylvania,* 152 F.3d 240, 245 (3d Cir. 1998). In my view, *Larsen* establishes our jurisdiction here to review the merits of the claimed immunity.

It is true that the Legislative Leaders raise their claimed privilege in a different context - as immunity from discovery while remaining parties to the civil action, not as immunity from liability or from having to be parties to the action at all. *See, e.g., Supreme Court of Virginia v. Consumers Union of* the *United States, Inc.*, 446 U.S. 719, 732-33 (1980). But that does not, as the Majority holds, change the fact that the Legislative Leaders assert a privilege that is a by-product of their status as legislators, just as their recognized immunity from liability and from having to defend themselves is a by-product of their status as legislators. *See id.* Clearly, the immunity that the Legislative Leaders claim is "legislative." The merits of their claimed privilege must be irrelevant to our jurisdictional analysis.

In my view, the Majority errs by conflating a merits analysis into its jurisdictional conclusion. The Majority recognizes that the Legislative Leaders claim that their immunity falls within the "legislative immunity" rubric, that the Legislative Leaders claim "a form of legislative immunity ..." Majority at 5. When the Majority subsequently states that the claimed immunity is "heretofore unknown in the law," Majority at 5, and that the Legislative Leaders "assert a privilege that does not exist", *id.* at 9, that sounds to me like a decision on the merits. The Majority's conclusion that we lack jurisdiction appears to rest on the following reasoning: A claim of legislative immunity in a new context, which lacks merit, ceases to be a traditionally recognized privilege and is not reviewable under our decision in *Bacher v. Allstate Ins. Co.*, 211 F.3d 52, 57 (3d Cir. 2000) (holding that the collateral order doctrine should not be extended beyond the narrow categories of trade secrets and traditionally recognized privileges). But this begs a question: If the asserted privilege is not "legislative" privilege because it is

not a "colorable claim" or is not raised in the appropriate context, what is it?

I believe that simply labeling the defense as "legislative" privilege, in a case involving legislators acting in a legislative capacity, is sufficient to trigger our collateral order jurisdiction, opening the door to immediate appellate review of the denial of such a claim, regardless of the fact that the "legislative" immunity arises in a new or different context or may lack merit. To my mind, our jurisdiction in the instant case is compelled by our decision in *Larsen,* where we expressly held that we had collateral order jurisdiction over the denial of claims of legislative immunity. *See Larsen,* 152 F.3d at 245.

Moreover, the District Court's order compelling the Legislative Leaders to comply with discovery fits within the three-prong analytical framework that we have established for determining whether an order is reviewable under *Cohen*: 1) it conclusively resolves the question of whether the Legislative Leaders must comply with discovery; 2) it resolves an important issue, immunity from discovery of legislators who are parties to a case, that is separate from the merits of the case; and 3) it effectively is unreviewable on appeal from a final judgment because the Legislative Leaders would be required to comply with discovery before they can later assert their immunity. *See In re Ford Motor* Co., 110 F.3d 954, 958 (3d Cir. 1997). Particular emphasis should be placed on the last prong, granting jurisdiction over those orders that would be effectively unreviewable on appeal from a final judgment, *see Cunningham v. Hamilton County,* 527 U.S. 198, 204 (1999); *Digital Equip. Corp. v. Desktop Direct, Inc.,* 511 U.S. 863, 867 (1994); *Ford Motor Corp.,* 110 F.3d at 958, meaning that the legal and practical value of the asserted privilege would be destroyed if not vindicated prior to trial.

See Lauro Lines SRL v. Chasser, 490 U.S. 495, 498-99 (1989).

The Majority relies on our decision in *Bacher, supra.* But that decision is not as limiting as the Majority suggests. *Bacher* does not stand for the proposition that a traditionally recognized privilege over which we would have collateral order jurisdiction, such as legislative immunity, ceases to be a traditionally recognized privilege merely because it is raised in a new context and therefore ceases to be a colorable or meritorious claim of that privilege. *Bacher* did not involve a claim of a particular, identifiable privilege but was a case in which a party to a civil action attempted to appeal a run-of-the-mill discovery order. The defendant there merely sought to avoid complying with simple discovery requests on the ground that the information sought (the amounts of past settlements paid) was confidential and not relevant and its disclosure would violate public policy, *see Bacher,* 211 F.3d at 53, but not because any privilege or immunity was implicated. Our conclusion that we lacked jurisdiction was not a new limitation on the collateral order doctrine but rather a consistent application of the long-standing rule that simple discovery orders are not final orders subject to immediate review. *See Bacher,* 211 F.3d at 53 (quoting *Ford Motor Co.,* 110 F.3d at 958). Here, by contrast, the Legislative Leaders assert a defined, specific, well-established, traditionally recognized privilege or immunity, albeit with a twist. But that twist, regardless of its effect on the merits of the privilege claim, does not affect our jurisdiction and does not turn this case into *Bacher* - the claimed privilege remains legislative, it remains traditionally recognized, and it therefore should remain immediately reviewable.

Nor, as the Majority suggests, *see* Majority at 12, does *Bacher* require us to conduct a confined examination of the *merits* of the claimed privilege, only of the *nature* of the privilege, that is, of the type of immunity asserted. I suggest no differently. As I see it, we must look at the record, determine the nature or type of immunity asserted, and evaluate whether it is a traditionally recognized privilege, such as legislative immunity; this is precisely what *Bacher* commands. But looking at whether the immunity asserted is legislative, meaning asserted by legislators based on their official activity, and thus traditionally recognized, is not a merits determination. I have not taken "a peek at the merits," Majority at 12, just at the nature of the privilege asserted. Only after concluding that the asserted privilege is legislative and that we therefore have collateral order jurisdiction, do I even broach the necessarily separate and distinct question of whether that claim of legislative immunity has merit in its current context.

I am concerned with the impact that this ruling may have on future cases. It is not contested that plaintiffs could challenge the legality of legislative decisions by suing the executive officers charged with carrying out those decisions.* Further, it is clear that plaintiffs could sue municipalities for legislative actions and the municipalities

---

* It is worth noting that not all the Legislative Leaders' activities in funding education could be deemed legislative; some activities could be deemed executive and legislative immunity would not attach to such activities. *See Carver v. Foerster*, 102 F.3d 96, 101 (3d Cir. 1996) (an officer's executive or administrative actions are separate from legislative actions). For example, the record reflects that two of the Legislative Leaders are *ex officio* members of the Pennsylvania Board of Education, an executive department; any actions in that role properly should be deemed executive.

themselves are not entitled to legislative immunity. *See Carver v. Foerster,* 102 F.3d 96, 104 (3d Cir. 1996). It also is clear that the individual legislators could not be named as defendants in such a case, or could be dismissed at an early stage if the suit were based upon their legislative activities. *See Bogan v. Scott-Harris,* 523 U .S. 44, 52-54 (1998); *Supreme Court,* 446 U.S. at 733-34. But we have not addressed whether a non-party legislator would be legislatively immune from being made to comply with subpoenas for discovery in a civil action.

The Fourth Circuit has decided this issue, holding that non-party legislators cannot be made to testify or provide evidence as to their legislative activities or their motives. *See Burtnick v. McLean,* 76 F.3d 611, 613 (4th Cir.1996); *Berkley v. Common Council of* the *City of Charleston,* 63 F.3d 295, 303 n.9 (4th Cir. 1995) (en banc) (suggesting, but not holding, that prior law indicates that members of the council would be privileged from testifying). We have, on the other hand, noted that the intent-based inquiry that is part of certain doctrines in constitutional law necessarily means that judicial inquiry into legislative motive is not *per se* forbidden in such cases. *See Carver,* 102 F.3d at 104; *see also Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.,* 429 U.S. 252, 268 n.18 (1977) (stating that in some extraordinary circumstances, the members of a legislative body might be called to testify about legislative actions, although this is usually to be avoided). We also have held that a state legislator may be subpoenaed to provide evidence to a grand jury of which the legislator is not the target. *See In re Grand Jury (Granite Purchases),* 821 F.2d 946, 958 (3d Cir. 1987).

The immunity of a non-party legislator from civil discovery thus is an open issue in this Circuit, one that we

may be called upon to resolve at some point. But suppose that case were to arise and the District Court were to reject the claimed privilege and order the non-party legislator to comply with the subpoena and provide testimony and discovery. Would we have jurisdiction immediately to review that order? As I read today's decision, the answer is no. I see no way to distinguish the future case from the instant case. A privilege from discovery by a non-party legislator would be as new in this Circuit as the privilege that the Legislative Leaders seek to assert in the instant case; it would not be a traditionally recognized privilege, foreclosing our immediate review under the Majority's reading of *Bacher*. We could not distinguish this future case from the instant one by saying that those legislators are asserting a legislative privilege (that is, a privilege that they possess by virtue of and in connection with their positions and activities as legislators) and that legislative immunity is a traditionally recognized privilege, because the Legislative Leaders here assert a privilege that unquestionably is "legislative" under such a definition. The only possible distinction between the instant case and the future case is that the latter might have more merit than the former, that it might be a colorable application of legislative immunity. But such consideration of the merits of a privilege must be irrelevant to the question of our jurisdiction.

If legislative privilege from civil discovery exists, either for a party, as in the instant case, or for a non-party as it may arise in the future, it exists to protect legislators from the burden of having to respond to discovery and of having to deal with the distractions and disruptions that discovery imposes on their ability to carry out their governmental functions. *See Supreme Court*, 446 U .S. at 733; *Larsen*, 152 F.3d at 245; *see also Mitchell v. Forsyth*, 472 U.S. 511, 529-30 (1985) (same with respect to

qualified executive immunity). But a privilege from discovery (assuming, *arguendo,* it exists in either situation) is worthless if it cannot be vindicated prior to the legislators being forced to comply with discovery. Yet the Majority's approach effectively renders any possible claim of a legislative discovery privilege unreviewable until after discovery has been obtained. I cannot agree with such a limitation on our appellate jurisdiction.

Because I find that we do have jurisdiction over the Legislative Leaders' appeal, my next step would be to reach the merits of the claimed privilege. I would reject the privilege on its merits. In this regard, much of my reasoning is similar to that of the Majority. Indeed, that suggests to me that the Majority is, in fact, conducting a merits analysis of the immunity claim and, in effect, rejecting the Legislative Leaders' claim on that basis.

The Legislative Leaders knowingly, willingly, and voluntarily entered this case by intervening as defendants. They explicitly wish to remain as defendants. And they repeatedly insist that they should be treated the same as all other defendants, as if they had been named in the original filing, entitled to all the privileges and rights of parties to civil litigation. It follows, I believe, that they waived any immunity from discovery by the decision to enter and remain in the case and to assert their rights as defendants.

The Legislative Leaders have pointed to no case in which a legislator who is a party to a civil action has been held to be immune from discovery. Every case the Legislative Leaders cite in their briefs and at oral argument involves attempts to take discovery in a civil case from legislators who are not parties to the case. *See Burtnick,* 76 F.3d at 613; *Brown & Williamson Tobacco Corp. v. Williams,* 62 F.3d 408, 421 (D.C. Cir. 1995). As discussed

supra, we have not determined whether such immunity exists in this Circuit and I offer no opinion as to whether such privilege should exist. But none of these cases supports the proposition that a legislator who chooses to become a party to a civil action is immune from discovery.

The party /non-party distinction is critical. Legislative immunity is intended to protect legislators from having to divert their time, energy, and attention from their legislative tasks in order to defend themselves or to provide evidence in a civil action. It protects legislators from the potential harassment, disruption, and distraction that would come with the burden of having to defend themselves and/ or provide evidence. *See Supreme Court,* 446 U .8. at 733; *Grand Jury,* 821 F.2d at 958. But the prophylactic function of the immunity is undermined once the Legislative Leaders choose to join the case. They have willingly subjected themselves to any disruptions and distractions that go with being party to civil litigation. They cannot now claim that they should be protected from the disruptions and distractions that they voluntarily undertook.

The Legislative Leaders attempt to downplay the significance of their intervention. Although they certainly recognize that legislative immunity may be waived, *see Government of the Virgin Islands v. Lee,* 775 F.2d 514, 520 n.7 (3d Cir. 1985) (noting that criminal defendant legislator's claim that he was impermissibly deposed was "unpersuasive" where the deposition was voluntary and the defendant waived any privilege); *Burtnick,* 76 F.3d at 613 (holding that non-party's privilege from being compelled to testify could be waived), the Legislative Leaders suggested at oral argument that intervening did not waive their privilege because any such waiver was not sufficiently explicit. I cannot conceive, however, of a more explicit waiver of immunity than willingly submitting oneself to the

jurisdiction of a federal district court. If the Legislative Leaders had been named as defendants in the first instance and had failed to assert their legislative immunity as an affirmative defense, they unquestionably could be deemed to have waived that immunity. Intervening places them in the identical position.

I find helpful the analysis of the District Court in an analogous situation, in *May v. Cooperman,* 578 F. Supp. 1308 (D.N.J.1984), *aff'd in part, appeal dismissed in relevant part,* 780 F.2d 240 (3d Cir. 1985). In *May,* four members of the New Jersey legislature, representing that body, intervened as defendants in a § 1983 action to defend the constitutionality of a state statute because the executive refused to defend it. After the law was struck down, the District Court assessed attorneys' fees against the legislative defendants, under 42 U.S.C. § 1988; the legislators argued that they were absolutely immune from an award of attorneys' fees for their legislative activity. The District Court rejected this argument, holding that the legislators had interjected themselves into the lawsuit by intervening and becoming parties, thereby waiving their legislative immunity from incidents of suit, such as attorneys' fees. *See May,* 578 F. Supp. at 1316-17. The District Court distinguished prior immunity cases, such as *Supreme Court,* because the New Jersey legislators had chosen to intervene and assume defense of the statute. *See id.* at 1317.

Similarly, compliance with discovery, and being compelled to comply with requests for documents, information, and testimony, are incidents of suit. Regardless of whether the Legislative Leaders would have been immune from such incidents as non-parties, it is clear that they surrendered any immunity from discovery by

voluntarily and willingly entering and remaining in the action as party defendants.

I close by emphasizing that my analysis and the Majority's analysis are very similar in denying the asserted legislative immunity from discovery. The difference is that the Majority concludes that the lack of merit takes the immunity outside the bounds of legislative immunity and divests us of collateral order doctrine jurisdiction. I conclude that, because the asserted immunity is "legislative," we have collateral order jurisdiction. The lack of merit to the claim of immunity means the claim should be denied on its merits. I would affirm the judgment of the District Court because the Legislative Leaders have waived any immunity from discovery. They are as subject to production of documents and of testimony as is any other party.

For the above reasons, I concur only in the judgment of the Court.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

ORDER OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

AND NOW, this 25th day of April, 2000, upon consideration of the Plaintiffs' Motion to Compel Discovery from Legislative Leaders, it is hereby ORDERED that the Motion is GRANTED.

It is further ORDERED that the Legislative leaders, Matthew Ryan, Robert C. Jubelirer, Jess M. Stairs and James J. Rhodes shall make full and complete production of all documents requested in Plaintiffs' First Set of Requests for Production of Documents that are within their possession, custody or control.

It is further ORDERED that the Legislative leaders shall provide full and complete responses to all of the School District of Philadelphia's First Set of Interrogatories.

It is further ORDERED that the Legislative leaders shall pay to plaintiffs the reasonable costs of this Motion. Counsel for plaintiffs shall submit an affidavit of their costs, including reasonable attorneys' fees, within 15 days of the date of this Order.

_____
HERBERT J. HUTTON, J.

APPENDIX C

ORDER OF THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING *EN BANC*

No. 00-1711

Present: BECKER, Chief Judge, SLOVITER, MANSMANN, SCIRICA, NYGAARD, ALITO, ROTH, McKEE, BARRY, AMBRO, and FUENTES, Circuit Judges and SHADUR,* District Judge.

SUR PETITION FOR REHEARING
WITH SUGGESTION FOR REHEARING *EN BANC*

The petition for rehearing *en banc* filed by Appellants having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *en banc*, the petition for rehearing *en banc* is DENIED.

BY THE COURT:

---

* The Honorable Milton I. Shadur, United States District Judge for the Northern District of Illinois, as to panel rehearing only.

DATED: 03 MAY 2001 Circuit Judge

APPENDIX D

MANDATE OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 00-1711

Before: ROTH, BARRY, Circuit Judges and SHADUR,[1] District Judge

---

JUDGMENT

This cause came to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued on January 18, 2001,

After consideration of all contentions raised by the appellants, it is ADJUDGED and ORDERED that this appeal be and hereby is dismissed for lack of jurisdiction.

Cost taxed against appellants.

ATTEST:

/S/
Marcia M. Waldron, Clerk

Dated: 5 April 2001

---

[1] The Honorable Milton I. Shadur, United States District Judge for the Northern District of Illinois, sitting by designation.

APPENDIX E

COMPLAINT OF POWELL, ET AL.

Preliminary Statement

1. Students who attend public school in Philadelphia, their parents and guardians, and organizations that represent their interests ("Student and Organization Plaintiffs"); The School District of Philadelphia, the Board of Education of the School District of Philadelphia, and officials who lead the School District ("School District Plaintiffs"); and the Mayor of the City of Philadelphia and the City of Philadelphia ("City Plaintiffs"), bring this action against officials of the Commonwealth of Pennsylvania who are responsible for the public education of children in the Commonwealth, including those in Philadelphia. Plaintiffs allege that Defendants have discriminated in effect, and with knowledge thereof before they acted, repeatedly, against children in the School District on grounds of their race, color and national origin by denying to the School District, and therefore to the children it educates, the financial support required to provide a thorough and efficient educational system which is racially non-discriminatory and racially non-segregated and which provides educational opportunity equal to that which children who live in predominantly white school districts receive.

2. Because the Defendants receive federal funding to support public education throughout the Commonwealth, including in Philadelphia, they are prohibited by Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d through 2000d-4a, and the Title VI implementing regulations governing federal financial support for education, 34 C.F.R. part 100, from

discriminating on the basis of race, color, or national origin in the educational opportunities and funding system they provide. The Student and Organization Plaintiffs, the School District Plaintiffs, and the City Plaintiffs all are harmed by such discrimination by Defendants in the provision of such a system for funding public education in Pennsylvania, and seek declaratory, injunctive and other appropriate relief to stop further such discrimination.

I. THE PARTIES.

3. Plaintiff David Powell is an African-American citizen, taxpayer, and resident of the Commonwealth and the City. David Powell is the father and guardian of Brandon Smith and Steven Smith, both minors, who also are African-American and who attend Ellwood Elementary School in the School District. David Powell seeks relief for himself and on behalf of Brandon Smith and Steven Smith, who are intended beneficiaries of federal programs and funding for public education, including the programs described in ¶¶ 34-36, below.

4. Plaintiff Shelean Parks is an African-American citizen, taxpayer, and resident of the Commonwealth and the City. Shelean Parks is the mother and guardian of Robin Parks, Robert Parks, MaryLean Parks and Willena Parks, all minors, who also are African-American and who attend Wanamaker Middle School (Robin) and Ferguson Elementary School (Robert, MaryLean and Willena) in the School District. Shelean Parks seeks relief for herself and on behalf of Robin Parks, Robert Parks, MaryLean Parks, and Willena Parks, who are intended beneficiaries of federal programs and funding for public education, including the programs described in ¶¶ 34-36, below.

5. Plaintiff Patrice Everage is an African-American citizen, taxpayer, and resident of the Commonwealth and the City. Patrice Everage is the mother and guardian of Christie Everage, a minor, who also is African-American and who attends John B. Kelly Elementary School in the School District. Patrice Everage seeks relief for herself and on behalf of Christie Everage, who is an intended beneficiary of federal programs and funding for public education, including the programs described in ¶¶ 34-36, below.

6. Plaintiff Julia A. Davis is an African-American citizen, taxpayer, and resident of the Commonwealth and the City. Julia A. Davis is the mother and guardian of Rafiyq Davis, a minor, who also is African-American and who attends Lingelbach Elementary School in the School District. Julia A. Davis seeks relief for herself and on behalf of Rafiyq Davis, who is an intended beneficiary of federal programs and funding for public education, including the programs described in ¶¶ 34-36, below.

7. Plaintiff Yvette Bland is an African-American citizen, taxpayer, and resident of the Commonwealth and the City. Yvette Bland is the mother and guardian of Marika Bland, Turquoise Bland, Robert Bland, Martinez Bland, and Marco Bland, all minors, who also are African-American and who attend Fitzpatrick Elementary School (Marika and Turquoise) and Ferguson Elementary School (Robert, Martinez and Marco) in the School District. Yvette Bland seeks relief for herself and on behalf of Marika Bland, Turquoise Bland, Robert Bland. Martinez Bland, and Marco Bland, who are intended beneficiaries of federal programs and funding for public education, including the programs described in ¶¶ 34-36, below.

8. Plaintiff Geraldine Newton is an African-American citizen, taxpayer, and resident of the Commonwealth and the City. Geraldine Newton is the mother and guardian of Christopher Newton, a minor, who also is African-American and who attends the Saul High School for Agricultural Science in the School District. Geraldine Newton seeks relief for herself and on behalf of Christopher Newton, who is an intended beneficiary of federal programs and funding for public education, including the programs described in ¶¶ 34-36, below.

9. Plaintiff Maria M. Rivera is an Hispanic citizen, taxpayer, and resident of the Commonwealth and the City. Maria M. Rivera is the mother and guardian of Rachelle Rivera, a minor, who also is Hispanic and who attends Lowell Elementary School in the School District. Maria M. Rivera seeks relief for herself and on behalf of Rachelle Rivera, who is an intended beneficiary of federal programs and funding for education, including the programs described in ¶¶ 34-36, below.

10. Plaintiff Mary E. Miller is a white citizen, taxpayer, and resident of the Commonwealth and the City. Mary E. Miller is the mother and guardian of Paul Miller and George Miller, both minors, who also are white and who attend the Furness High School and Pepper Middle School, respectively, in the School District. Mary E. Miller seeks relief for herself and on behalf of Paul Miller and George Miller, who are intended beneficiaries of federal programs and funding for public education, including the programs described in ¶¶ 34-36, below.

11. Plaintiffs Gregory and Catherine Luzak are white citizens, taxpayers, and residents of the Commonwealth and the City. Gregory and Catherine Luzak

are the parents and guardians of Catherine Luzak, Gregory Luzak, Jr., and Danielle Luzak. Catherine Luzak and Gregory Luzak Jr., both minors, also are white and attend the Franklin School in the School District. Gregory and Catherine Luzak intend that Danielle Luzak, a minor, who also is white, will attend kindergarten at a school in the School District in fall of 1998. Catherine and Gregory Luzak seek relief for themselves and on behalf of Catherine Luzak, Gregory Luzak, Jr., and Danielle Luzak who are the intended beneficiaries of federal programs and funding for public education, including the programs described in ¶¶ 34-36, below.

12. Plaintiff Fu-Zhen Xie is a Chinese-American permanent resident of the United States, a taxpayer, and resident of the Commonwealth and the City. Fu-Zhen Xie is the mother and guardian of Sandy Yu and Shannon Yu, both minors, who also are Chinese-American and who attend McCall Elementary School in the School District. Fu-Zhen Xie seeks relief for herself and on behalf of Sandy Yu and Shannon Yu, who are intended beneficiaries of federal programs and funding for public education, including the programs described in ¶¶ 34-36, below.

13. Plaintiff The Black Clergy of Philadelphia and Vicinity is an association consisting of over 400 ministers representing seven denominations and serving 300,000 people, of whom 80% live in the City of Philadelphia. The vast majority of its members are parents or grandparents of Philadelphia public school students. Many of the ministries represented by the Black Clergy of Philadelphia and Vicinity conduct Head Start and Get Set pre-school programs and run after-school programs or tutoring programs for students in order to assist in their education and overcome the inadequacies of the

educational programs and services available in the School District, due at least in part to the Commonwealth's wrongful failure to provide sufficient funds to the School District.

14. Plaintiff Philadelphia Branch NAACP is a not-for-profit organization with over 3,000 members who are Philadelphia residents and taxpayers, more than half of whom are low-income parents of public school children. The Philadelphia Branch NAACP supports tutoring programs and workshops for Philadelphia public school students, raises funds to supplement technology and books available in the School District, supports literacy programs for adults, and takes other steps to compensate for the inadequacies in the educational programs and services available in the School District due at least in part to the Commonwealth's wrongful failure to provide sufficient funds to the School District. The Philadelphia Branch NAACP maintains an office at 1231 North Broad Street, Philadelphia, Pennsylvania.

15. Plaintiff ASPIRA Inc. of Pennsylvania is a not-for-profit organization that works with more than 3,500 students in Philadelphia and more than 400 public school drop-outs in an attempt to compensate for the inadequacies in the educational programs and services available in the School District due at least in part to the Commonwealth's wrongful failure to provide sufficient funds to the School District. More than 600 students enrolled in the School District are members of ASPIRA clubs and more than 400 parents are members. ASPIRA maintains an office at 2726 North 6th Street, Philadelphia, Pennsylvania.

16. Plaintiff Parents Union for Public Schools is a not-for-profit organization with nearly 1,000 members, all of whom are parents of students enrolled in the School

District's schools. The Parents Union for Public Schools advises parents on resources available to their children in the school system and how to participate in the educational process to further their children's education, as well as acting as an advocate for parents and students in the system. Parents Union for Public Schools maintains an office at 311 South Juniper Street, Philadelphia Pennsylvania.

17. Plaintiff Citizens Committee on Public Education in Philadelphia is a not-for-profit organization that has the purpose of maintaining and improving the quality of education available in the School District through public advocacy. It has more than 200 members, including four Home and School Associations from Philadelphia public schools. Many of its individual members are parents or grandparents of children enrolled in the School District. The Citizens Committee on Public Education in Philadelphia maintains offices at 311 South Juniper Street, Philadelphia, Pennsylvania.

18. Plaintiff Parents United for Better Schools is a not-for-profit parent advocacy organization with several thousands of members, the majority of whom are public school parents. It provides tutoring programs and other services to low income students and parents in an attempt to compensate for the inadequacies in the educational programs and services available in the School District due at least in part to the Commonwealth's wrongful failure to provide sufficient funds to the School District. Parents United for Better Schools maintains an office at 31 Maplewood Mall, Philadelphia, Pennsylvania.

19. The Plaintiff Organizations each oppose racial discrimination and work to combat discrimination in public education. Plaintiff Organizations have had to direct

their funds and other resources from other activities because of the wrongful failure of the Commonwealth to provide a thorough and efficient educational system which is racially non-discriminatory and racially non-segregated and which provides educational opportunity equal to that which children who live in predominately white districts receive.

20. The School District Plaintiffs have been delegated by the Commonwealth part of the Commonwealth's responsibility to educate school-age children residing in the City. David W. Hornbeck, as Superintendent of the School District, Floyd W. Alston, as President of the Board of Education of The School District of Philadelphia, and the Board of Education of The School District of Philadelphia have been delegated those powers specified and necessarily implied by the laws of Pennsylvania concerning education of public school students in Philadelphia, and have responsibility for implementing those laws. Plaintiffs Hornbeck and Alston and the Board of Education of The School District of Philadelphia maintain offices at 21st and the Parkway, Philadelphia, Pennsylvania. The School District of Philadelphia, a corporate entity with the right to sue, operates pursuant to the Public School Code. The School District has an office at 2130 Arch Street, Philadelphia, Pennsylvania.

21. The School District has been granted certain home rule powers with respect to the provision of education in Philadelphia, pursuant to the First Class City Home Rule Education Act. The School District was created and established by the people of Philadelphia, in the School District Home Rule Charter.

22. The School District is the only public school district in the Commonwealth without the independent power of taxation.

23. The student population enrolled in the public schools in the School District has grown from 190,979 in the 1991-92 school year, to approximately 213,800 students in the 1997-98 school year. The student population enrolled in the School District between the 1991-92 and 1997-98 school years has at all times been between approximately 77% and 80% racial and ethnic minority students.

24. In the 1995-96 school year, the School District was responsible for the education of only approximately 12% of the Commonwealth's total public school students, but it has the responsibility to serve nearly 50% of all African-American, Hispanic, Asian and other minority children attending public school in Pennsylvania.

25. Plaintiff Mayor Edward G. Rendell is the Chief Executive Officer of the City. Pursuant to the Philadelphia Home Rule Charter ("PHRC"), Mayor Rendell is responsible for the conduct of all the executive and administrative work of the City, including management of the City's finances, and promoting the City as a place where the citizens of the Commonwealth can live and work productively in a racially nondiscriminatory environment.

26. Plaintiff City of Philadelphia, a home rule municipal corporation, is the only City of the First Class in Pennsylvania. The City has adopted a Home Rule Charter in accordance with the First Class City Home Rule Act 53 P.S. §§ 13101 et seq. The City's boundaries are coterminous with those of the School District, and the City relies on the same limited local tax base as does the School

District for local revenues. The City has an office at 215 City Hall, Philadelphia, Pennsylvania.

27. Defendant Governor Thomas J. Ridge is the Chief Executive Officer of the Commonwealth, pursuant to Article IV of the Pennsylvania Constitution. The Governor has all powers specified and necessarily implied by the Constitution and laws of Pennsylvania, including the power and obligation to recommend education spending to the General Assembly, approve legislative appropriations, and supervise the executive departments that administer regulations and programs governing the School District, and to see that the Thirteenth and Fourteenth Amendments to the United States Constitution and all federal statutes and regulations are followed in carrying out his duties. The Governor is responsible, with the advice and consent of the Senate, for appointing the Secretary of Education and members of the State Board of Education. Defendant Governor Ridge is sued in his official and individual capacities and has an office at 225 Main Capitol Building, Harrisburg, Pennsylvania.

28. Defendant Dr. James P. Gallagher, as Chairperson of the State Board of Education, has all powers specified and necessarily implied by the laws of Pennsylvania, including, inter alia, powers and duties pertaining to school districts pursuant to 26 P.S. §§ 2601 B, et seq., and is barred from carrying out any of his duties in a way that violates the Thirteenth or Fourteenth Amendment to the United States Constitution or any federal statute or regulation. Defendant Dr. Gallagher is sued in his official and individual capacities. Defendant Dr. Gallagher resides in the Eastern District of Pennsylvania at The White House, Philadelphia College of Textiles and Sciences, Henry Avenue and Schoolhouse Lane,

Philadelphia, Pennsylvania, and has an office at 333 Market Street, Harrisburg, Pennsylvania.

29. Defendant Secretary of Education Eugene W. Hickok is a Constitutional officer under Article IV section 8 of the Pennsylvania Constitution and has all powers specified and necessarily implied by the Constitution and laws of Pennsylvania, including responsibility for administration and supervision of the Commonwealth Department of Education ("DOE"). Secretary Hickok is barred from carrying out any of his duties in a way that violates the Thirteenth or Fourteenth Amendment to the United States Constitution or any federal statute or regulation. The DOE, inter alia, is responsible for administering laws concerning public schools. 71 P.S. § 351, § 352 and § 1037. The DOE is a state education agency that receives and distributes federal funds under various federal programs affecting education. Secretary Hickok is sued in his official and individual capacities and has an office at 333 Market Street, Harrisburg, Pennsylvania.

30. Defendant State Treasurer Barbara Hafer is a constitutional officer under Article IV section 1 of the Pennsylvania Constitution and has all powers specified and necessarily implied by the Constitution and laws of Pennsylvania, and is responsible for the administration and supervision of the State Treasury, and is barred from carrying out any of her duties in a way that violates the Thirteenth or Fourteenth Amendment to the United States Constitution or any federal statute or regulation. The Treasury is responsible for, inter alia, the disbursement of funds, both federal and state, for purposes of education. PA. CONST. art. III, § 24, 71 P.S. § 247, 72 P.S. § 1501, § 4451 et seq. State Treasurer Hafer is sued in her official and individual capacities and has an office at 129 Finance

Building, Harrisburg, Pennsylvania. (Defendants are collectively referred to herein as the "Commonwealth Defendants.")

31. The plaintiffs are seeking only injunctive and declaratory relief against the above-named Commonwealth Defendants in their individual capacities.

II. JURISDICTION AND VENUE.

32. This Court has jurisdiction pursuant to 28 U.S.C. §1331 (federal question jurisdiction), 28 U.S.C. §1343(a)(3) and (4) (civil rights actions), and 28 U.S.C. §§ 2201, et seq. (declaratory judgments).

33. Venue is appropriate pursuant to 28 U.S.C. §1391(b), because the claim arose in the Eastern District of Pennsylvania and because Defendant Dr. James P. Gallagher resides in the Eastern District of Pennsylvania.

III. FEDERAL FINANCIAL ASSISTANCE.

34. The Commonwealth receives federal financial assistance for the support of public education in Pennsylvania. Public elementary and secondary education in Pennsylvania, including Philadelphia, is a program or activity receiving federal financial assistance.

35. The Commonwealth receives federal financial assistance through a variety of federal programs designed to support the efforts of Commonwealth public school districts, including Philadelphia, to provide a thorough and efficient educational system which is racially non-discriminative and racially non-segregated and which provides educational opportunity equal to that which children who live in predominately white school districts

receive. The School District receives federal financial assistance directly and also receives federal funds from the Commonwealth through federal programs that distribute funds for education to local school districts through the states, including, inter alia:

a. Funding under the Elementary and Secondary Education Act of 1965 ("ESEA"), as amended by the Improving America's Schools Act of 1994, known as Chapter I or Title 1. Chapter I/Title 1 provides federal financial assistance to state and local education agencies, for the purpose, inter alia, of meeting the special educational needs of disadvantaged children of low income families;

b. Funding under ESEA Chapter II or Title 6, titled "Innovative Education Program Strategies," for Commonwealth-administered block grants to permit local school districts to design and implement promising or innovative educational improvement programs;

c. Funding under ESEA Title 3 Part A, Technology for Education, that provides competitive grants to support the development, interconnection, implementation, improvement, and maintenance of an effective educational technology infrastructure;

d. Funding under the Dwight D. Eisenhower Professional Development Program, to strengthen and improve teaching and learning in core academic subject areas.

36. The City of Philadelphia receives federal funds, both directly and through the Commonwealth, for programs and services that support and assist the School District and its students, including, inter alia:

a. Funding that the City uses to establish Family Centers in schools within the School District to provide support services to families with children who are at risk of abuse and neglect;

b. Funding through the D.A.R.E. program, which the City uses to send police officers into classrooms in the School District to conduct drug awareness education;

c. Funding for an Adolescent Initiative federal grant through the Commonwealth that provides services to children in foster care to insure that they graduate from high school and learn skills for living independently;

d. Funding through a federal Community Service Block Grant for an after-school computer education program and, through the Philadelphia Police Department, a Local Law Enforcement Block Grant that is used to increase truancy enforcement in School District schools.

IV. THE COMMONWEALTH DEFENDANTS ARE AWARE OF THE INABILITY OF THE SCHOOL DISTRICT TO PROVIDE EDUCATIONAL OPPORTUNITY EQUAL TO THAT PROVIDED IN PREDOMINANTLY WHITE SCHOOL DISTRICTS AND OTHERWISE TO MEET THE EDUCATIONAL NEEDS OF ALL OF THE SCHOOL DISTRICT'S STUDENTS.

37. The Commonwealth Defendants are and have been aware of the characteristics of the students in the School District and of the effects of racial isolation,

segregation and discrimination on those students through the actions of various Commonwealth agencies and courts. The Commonwealth Defendants, are on notice that federal, Commonwealth, and local governmental policies -- some of which existed for centuries until May 17, 1954, some of which continued to a much later date, and some of which continue until today -- have adversely affected African-Americans and other minorities and that in many cases the adverse effects of such policies still exist today. Specifically, as to the School District and its students, the Pennsylvania Human Relations Commission ("PHRC"), a commission of the Commonwealth of Pennsylvania, determined on June 7, 1971, that the School District was unlawfully segregated by race. That determination was affirmed by the Commonwealth Court and the Supreme Court of Pennsylvania. PHRC v. School Dist. of Philadelphia, 6 Pa. Cmwlth. 281, 294 A.2d 410 (1972), aff'd, 455 Pa. 52, 313 A.2d 156 (1973).

38. In 1994, the Commonwealth Court found that the School District continues to deny students equal educational opportunity based on their race. PHRC v. School Dist. of Philadelphia, 161 Pa. Cmwlth. 281, 638 A.2d 304 (1994).

39. The PHRC and the Commonwealth Court have conducted extensive proceedings designed to formulate and modify remedial plans to combat the effects of segregated conditions in the School District. The PHRC, an agency of the Commonwealth, has argued throughout the proceedings that the purpose of the Pennsylvania Human Relations Act is to promote equal opportunity, including equal educational opportunity for all of the students attending the public schools within the Commonwealth, but that the School District has not yet succeeded in doing so.

40. On November 3, 1995, the Commonwealth of Pennsylvania and Governor Ridge were joined as parties in Pennsylvania Human Relations Commission v. School District of Philadelphia, King's Bench Jurisdiction Assumed, No. 119 E.D. Misc. Dkt. 1991 __ Pa. __ (Pa. July 3, 1996). As a result, inter alia, of the 27-year litigation by a Commonwealth agency and joinder of the Governor and Commonwealth, the Commonwealth Defendants are fully on notice that the School District has not succeeded in desegregating its schools or in providing equal educational opportunities for minority students. The Commonwealth Defendants also are on notice that the School District has proposed an education reform plan designed to cure the racial disparities that exist in the School District, which has been Court approved and ordered; that the School District lacks adequate funds to implement that plan; that the Commonwealth has not supplied such funds; and that the School District, with no independent power to tax and an inadequate tax base from which to raise funds, therefore cannot implement fully that plan.

41. Records kept by the Commonwealth Defendants reflect the racial and ethnic composition of students enrolled in school districts throughout the Commonwealth. At all times relevant to this Complaint, the Commonwealth Defendants were aware that the School District was responsible for educating the largest group of non-white students in any school district in the Commonwealth - over 75% African-American, Hispanic, Asian and other minority - while the non-white enrollment in public schools in the rest of the Commonwealth as a whole was approximately 11%.

42. Commonwealth Defendants' records also demonstrate that, in 1995-96 (Fiscal Year 1996), the percentage of children attending school in the School District from families receiving Aid to Families with Dependent Children ("AFDC"), an indicator used by the Commonwealth Defendants to measure family poverty for education purposes, reached approximately 46% of the estimated Average Daily Membership ("ADM") of the School District. For the same year, Commonwealth records show that approximately 80% of the students in the School District were from low-income families, defined as families eligible for federally subsidized free or reduced price meals, and that the School District had the highest incidence of students in poverty of all 62 school districts in the surrounding five-county region.

43. The Commonwealth Defendants are and have been on notice that the City has among the highest incidences in the Commonwealth of poverty, support cases, child abuse, juvenile delinquency, births to single mothers, welfare placements, and AFDC placements. The Commonwealth Defendants are specifically on notice that Philadelphia has one of the Commonwealth's highest poverty ratios through, inter alia, the proceedings in PHRC v. School Dist. of Philadelphia, No. 1056 C.D. 1973, in the Commonwealth Court of Pennsylvania.

44. The Commonwealth Defendants further are and have been on notice that a school district, such as Philadelphia, faces a greater educational challenge and costs in educating children from poor families. A 1996 Report of the Governor's Advisory Commission on Public School Finance observed that "[i]n those areas in which there is a large population living in poverty, where crime is a serious problem, where dependence on public assistance is prevalent, it is more difficult to educate students and

more difficult for students to achieve at competitive levels. Moreover, schools confronting such problems may often provide a number of services that schools which do not confront these problems need not provide... ."

45. Through the Commonwealth's own indicators of student performance, and other indicators of student performance known to the Commonwealth Defendants, the Commonwealth Defendants are and have been on notice of the inability of the School District, due primarily to insufficient resources because sufficient resources have been and are being wrongfully withheld by the Commonwealth, to provide an appropriate education and equal educational opportunity, or to meet the needs of a substantial number of its students particularly including its racial and ethnic minority students.

46. The mean test score for students in the School District is significantly lower than for students statewide on indicators such as the Pennsylvania System of School Assessment tests and the Scholastic Aptitude Test. Indicators such as on-time high school graduation rates and Scholastic Aptitude Test scores reveal that students in the School District disproportionately perform lower than their peers elsewhere in the Commonwealth, and that racial and ethnic minority students in the School District disproportionately perform lower than their white counterparts.

V. THE COMMONWEALTH DEFENDANTS' FUNDING POLICIES AND PRACTICES HAVE DISPROPORTIONATELY AND REPEATEDLY DISADVANTAGED PHILADELPHIA, WITH FORESEEABLE HARM TO EQUAL EDUCATIONAL OPPORTUNITY AND ACHIEVEMENT FOR THE STUDENTS THAT THE SCHOOL DISTRICT SERVES.

47. The Commonwealth Defendants' statutorily established system for funding public education depends upon a combination of locally generated revenues authorized by the Commonwealth (that rely primarily upon local property taxes), state funds provided by the Commonwealth Treasury ("Commonwealth treasury revenues"), and certain federal funds. What the Commonwealth terms Basic Education Funding is the baseline instructional subsidy for school districts in the Commonwealth and is the principal source of Commonwealth treasury revenues to school districts. The Commonwealth Defendants adopted, with prior knowledge of its discriminatory consequences on students based on race and national origin in the School District and elsewhere, a different methodology each year from 1991-92 through 1996-97 to determine the Basic Education Funding entitlement that would be provided in the following year to school districts in the Commonwealth.

48. In the 1991-92 payable school year and for eight years previous, the Basic Education Funding provided by the Commonwealth was calculated under a formula that included an "aid ratio" factor that operated to increase aid to school districts that were relatively less wealthy (based on a combination of measures of personal income and market value of property in the district) than school districts in the Commonwealth on average. That formula also included extra subsidies for low-income students and population density.

49. The Commonwealth Defendants abandoned that formula after the 1991-92 school year. No Basic Education Funding formula used since by the Commonwealth Defendants has provided the subsidy for population density. For each year from 1993-94 through

1997-98, the Basic Education Funding formula used by the Commonwealth Defendants either ignored or significantly diminished the impact of the "aid ratio" factor that operates to increase aid to school districts that are relatively less wealthy than school districts in the Commonwealth on average. Formulas used by the Commonwealth after 1991-92 also have reduced the role of the student poverty factor. These formulae had an adverse effect on school districts which had the larger minority student populations, as the Commonwealth and the Commonwealth Defendants were aware.

50. The Commonwealth Defendants' own financial data demonstrate that the result of the changes in the formula has been a shift in Commonwealth treasury revenues away from Philadelphia schools, despite their well-known needs and the relatively high cost of educating Philadelphia students, which the Commonwealth Defendants knew or should have known represents a disproportionate allocation of funds away from the largest concentration of minority students in the Commonwealth.

51. The Commonwealth Defendants have changed the Commonwealth's Basic Education Funding in ways that had the foreseeable effect of disadvantaging students in Philadelphia, who are on average more likely to be from racial and ethnic minorities and poorer than students across the Commonwealth; the School District, because it educates such students in substantial numbers; and the City because it suffers and directly bears the economic and non-economic consequences of this disproportionate underfunding. The foreseeable result is a formula and an overall system of funding education that disadvantages school districts with a high concentration of minority students in poverty, and thereby all students enrolled in the School District.

52. The racially discriminatory impact of the Commonwealth Defendants' system for funding school districts is illustrated by a comparison of the School District with the other 61 neighboring school districts in the surrounding five-county area. Based on Commonwealth estimates of revenue for 1995-96, the education of students in the 61 neighboring suburban school districts was funded at a weighted average level of $8,476 in total revenue per pupil while the School District received $6,861 - a per pupil difference of $1,615, increasing from a gap of $1,083 per student in 1991-92. Of the 61 neighboring school districts, as of 1995-96, 48 had more than 80% white students and only two had more than 50% nonwhite students. Overall enrollment of the 61 districts has a weighted average of only 15.6% non-white students.

53. The Commonwealth Defendants' funding system for education gives school districts with high proportions of white students on average more Commonwealth treasury revenues than school districts with high proportions of non-white students, where the levels of student poverty are the same. When average Commonwealth treasury revenues per pupil in relation to the poverty character of the student body (as measured by percentage of students on AFDC) for each school district are calculated, the data for the School District in 1990-91 reveal that it received 27.2% less than the average of school districts with the same poverty rate. In a ranking of the 500 school districts, where number 1 is the school district receiving the greatest excess over what would be expected statistically on the basis of poverty using the Commonwealth's own funding data, and number 500 is the school district with the greatest shortfall, the School District ranked 421 in 1990-91. By 1995-96, Philadelphia received 33.1% less than expected statistically, and its rank

had dropped to 498 out of the 500 school districts in the Commonwealth.

54. Every other or virtually every other predominantly minority school district in the Commonwealth also receives less funding than is expected statistically on the basis of its poverty. All 12 of the school districts in the Commonwealth that in 1992 were more than 50% in minority student population were funded at a lower level in 1990-91 than expected statistically on this measure. By 1995-96, 11 out of those 12 high-minority school districts still has less Commonwealth treasury revenues per student than school districts with higher white enrollments and the same level of poverty.

55. When Commonwealth treasury revenues per pupil are analyzed by the amount of poverty in school districts across the Commonwealth, whether measured by AFDC or percentage of students eligible for free and reduced price meals, school districts with higher proportions of non-white students receive less Commonwealth treasury revenues than districts with higher proportions of white students. On average, for 1995-96, for two school districts with the same level of poverty as measured by AFDC, the school district with higher non-white enrollment received $52.88 less per pupil for each increase of 1% in non-white enrollment.

56. Commonwealth data also show that, between fiscal years 1992 and 1996, total revenues to school districts with 50% or more white students increased by a weighted average of $776 per pupil. For the same period, the increase in the School District was only $84 per pupil, despite its greater needs. The school districts in Pennsylvania with African-American and other non-white

enrollment of more than 75% received a weighted average increase in total revenue of only $149 per pupil.

57. For fiscal year 1996, each student in the School District had $458 less in support for his or her education than the average student in a school district that was majority white. For the same year, the average student in a school district that was less than 25% white had $389 less in educational support than the average student in a majority white school district.

58. Commonwealth data estimating Commonwealth treasury revenues for 1996 among the same school districts, by race, similarly reflect revenue increases that disproportionately benefit the school districts with relatively high proportions of white students and disproportionately shift revenues away from the school districts with relatively high proportions of non-white students. Commonwealth data show that, between fiscal years 1992 and 1996, Commonwealth treasury revenues to school districts with 50% or more white students increased by a weighted average of $498 per pupil. For the same period, the increase in the School District was only $361 per pupil, despite its greater needs. The school districts in Pennsylvania with African-American and other non-white enrollments of more than 75% received a weighted average increase in Commonwealth treasury revenues of only $384 per pupil.

59. These racial distinctions in the distribution of revenues for education, under the Commonwealth Defendants' policies and practices, are legally unjustifiable and racially discriminatory and Commonwealth Defendants had knowledge of such effects each time prior to taking action which achieved these results.

60. The Commonwealth's funding policies and practices disadvantage, and thereby discriminate against, school districts such as Philadelphia with relatively high non-white enrollments, and the students in those districts, and Commonwealth Defendants had knowledge of such effects each time prior to taking action which achieved these results.

61. The impact of the Commonwealth's funding policies and practices has been to deprive the School District of hundreds of millions of dollars per year. The impact will continue unless the Commonwealth Defendants' wrongful funding policies and practices are enjoined.

62. The foreseeable result has been serious impairment of the educational opportunities of the students in the School District, including the Student Plaintiffs. Lack of sufficient resources in the School District results, inter alia, in larger class sizes and higher pupil-to-teacher ratios than in surrounding school districts; reduced curricula; cuts in and elimination of programs and electives and advanced placement courses; shortages of textbooks and use of outdated textbooks; shortages of equipment, supplies and technology; spartan physical education and extracurricular programs; lack of librarians and library services; insufficient numbers of counselors and psychologists; and many inadequate and crumbling physical facilities.

63. The School District Plaintiffs have adopted annual budgets which have included substantial budget cuts since 1991-92, responding in large measure to the Commonwealth Defendants' challenged racially discriminatory funding policies and practices. Since the 1988-89 school year, more than 1,100 school-based

positions have been eliminated, including more than 800 classroom assistants and over 50 librarians. More than 80% of the School District's summer school programs have been dismantled, and extracurricular activities in high schools, including athletics, have been slashed nearly 50%. The School District Plaintiffs have undertaken other budget cuts which are outside of the classroom, but many of which also harm students' ability to learn. The School District Plaintiffs find themselves unable to make further budget cuts without additional irreparable harm to the School District's largely minority student population.

64. The City Plaintiffs are injured by the Commonwealth Defendants' challenged racially discriminatory funding policies and practices, since they contribute to declining urban population and erosion of the City's tax base. Individuals and businesses choose where to locate their residences and businesses in large part based upon the quality of public education in the area, and move out of or do not locate in the City because of the condition of the City's public school system. The fact that the resultant educational system more often turns out students in the School District not as equipped to deal with modern employment and modern life as the students who have the advantage of the educational system in the predominately white school districts of the Commonwealth further erodes the City's tax base.

65. The excessive requirements of local funding for the School District contribute to residents of the City ranking first in the Commonwealth in overall tax burden. The City made a $15 million special appropriation for the School District in spring of 1996, and again in the spring of 1997, in order to help avert a deficit. The City enacted the controversial liquor-by-the drink tax in 1994, at substantial economic cost to the tax base and political cost to the City,

in order to provide the School District with approximately $21 million per year. The City, through its Voluntary Contributions Program beginning in 1994, persuaded owners of tax exempt real estate to contribute approximately $3.5 million a year in voluntary contributions directly to the School District. The City continues to provide numerous forms of non-tax assistance to the School District, all at substantial cost. The expenditure of these sums for education, to compensate for the Commonwealth Defendants' wrongful funding policies and practices, means that the City has fewer funds available to meet other pressing, unmet or underserved urban needs.

66. The Commonwealth Defendants' challenged racially discriminatory funding policies and practices impose excessive requirements on local funding, making it impossible for the City to afford the tax relief its citizens desperately need, and making it impossible for the City to provide the competitive tax rates and public education system which it needs to attract and retain residents and jobs in order to bolster and replenish its tax base and further revitalize the schools.

Count I: Racial and National Origin Discrimination by Differential and Disparate Treatment Under Title VI Implementing Regulations (All Plaintiffs Against All Defendants)

67. The allegations set forth in ¶¶ 1-66 above are incorporated herein, by reference, as if fully set forth here.

68. Title VI provides in pertinent part:

> No person in the United States shall, on the ground of race, color, or national origin, be

> excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C. § 2000d.

69. Regulations implementing the requirements of Title VI for education programs or activities receiving federal financial assistance have been promulgated by the United States Department of Education, 34 C.F.R. part 100.

70. The United States Department of Education regulations prohibit federal fund recipients from the following discriminatory actions on the basis of race, color or national origin:

> Provide any service, financial aid, or other benefit to an individual which is different, or is provided in a different manner, from that provided to others under the program;
>
> Subject an individual to segregation or separate treatment in any matter related to his receipt of any service, financial aid, or other benefit under the program;
>
> * * *
>
> A recipient, in determining the type of services, financial aid, or other benefits, or facilities which will be provided under any such program, or the class of individuals to whom, or the situations in which, such services, financial aid, other benefits, or facilities will be provided under any such program, or the class of individuals to be afforded an opportunity to participate in any such program, may not,

> directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin...

34 C.F.R. § 100.3(b)(1), (2).

71. Public elementary and secondary education in Pennsylvania, including Philadelphia, is a program or activity to which Title VI and its implementing regulations apply. The Commonwealth received federal financial assistance from the United States Department of Education to support public education in Philadelphia in amounts exceeding $80 million in the 1996-97 school year, and continues to receive such assistance.

72. Offices and agencies of the Commonwealth for which the Commonwealth Defendants are responsible are federal fund recipients under applicable administrative regulations implementing Title VI and are subject to the prohibitions of Title VI and the administrative implementing regulations promulgated thereunder by the United States Department of Education.

73. The Commonwealth Defendants' funding policies and practices wrongfully discriminate against African-American, Hispanic, Asian and other minority students in the School District by utilizing criteria and methods that have had the foreseeable effect of subjecting such students to discrimination because of their race, color, or national origin, by disproportionately denying them necessary support for their education, in violation of the Title VI implementing regulations applicable to federal education programs. The Commonwealth Defendants'

funding policies and practices in turn harm the educational opportunities of all students in the School District, the School District Plaintiffs' ability to offer a thorough and efficient educational system which is racially non-discriminatory and racially non-segregated and which provides educational opportunity equal to that which children who live in predominately white school districts receive, and the City's economic and non-economic health by disproportionately undermining the quality of public education in Philadelphia.

74. While the Commonwealth Defendants have been accepting federal financial assistance to supplement their education efforts the Commonwealth, their policies and practices in the Commonwealth's education funding systems have wrongfully and disproportionately shifted funding away from Philadelphia and its substantially minority student body, in violation of Title VI and its implementing regulations.

75. The Commonwealth Defendants' funding policies and practices have the foreseeable, racially discriminatory effect of further isolating the Student Plaintiffs, the School District, and the City by race in the Philadelphia metropolitan area, and of impairing the School District Plaintiffs' ability to provide a thorough and efficient educational system which is racially non-discriminatory and racially non-segregated and which provides an educational opportunity equal to that which children who live in predominately white school districts receive, all in violation of the Title VI implementing regulations.

76. The implementing regulations interpreting the requirements of Title VI further prohibit federal fund recipients from utilizing "criteria or methods of

administration which . . . have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color, or national origin." 34 C.F.R. §100.3(b)(2).

77. The objectives of the Commonwealth's program and activity of public school education in Pennsylvania, for which the Commonwealth receives federal funds, are defeated or substantially impaired in Philadelphia by the Commonwealth Defendants' challenged racially discriminatory funding policies and practices. The objectives of specific federal programs for which the Commonwealth receives federal funds also are defeated or impaired by the Commonwealth Defendants' challenged funding policies and practices. Such federal programs include, inter alia:

a. Chapter I in its current reauthorization by Congress, which includes the objectives of enabling "schools to provide opportunities for children served to acquire the knowledge and skills contained in the challenging State content standards and to meet the challenging State performance standards developed for all children." 20 U.S.C. § 6301(d);

b. Title 6 in its current authorization by Congress, which includes the objectives, of supporting state and local school reform efforts and "State and local efforts to accomplish the National Education Goals." 20 U.S.C. § 7301(b);

c. The Technology for Education Act of 1994, which includes the objectives of support for "the acquisition and use by elementary and secondary schools in the United States of technology and technology–enhanced curricula, instruction, and administrative support resources

and services to improve the delivery of educational services." 20 U.S.C. §6812;

d. The Dwight D. Eisenhower Professional Development Program, which includes the objectives of supporting "access to sustained and intensive high-quality professional development that is aligned to challenging State content standards and challenging State student performance standards and to support the development and implementation of sustained and intensive high quality professional development activities in the core academic subjects... ." 20 U.S.C. §6602.

78. While the School District uses federal funding for the purposes designated, the Commonwealth Defendants' wrongfully discriminatory funding policies and practices result in the School District Plaintiffs' inability to meet the objectives of the federal programs. The Commonwealth Defendants' wrongfully discriminatory funding policies and practices also result in the School District Plaintiffs' inability to meet the objectives of the Commonwealth's federally funded program of public education, responsibility for which has been delegated in part to the School District Plaintiffs by the Commonwealth, and the needs of the School District's predominantly minority student population. Thereby, the Commonwealth Defendants are in violation of the United States Department of Education regulations implementing Title VI.

Count II: Under 42 U.S.C. § 1983 For Deprivation Of Rights Secured by the Laws of the United States (Student and Organization Plaintiffs Against All Defendants)

79. The allegations set forth in ¶¶ 1-78 above are incorporated herein by reference, as if fully set forth here.

80. The Commonwealth Defendants' actions complained of herein have the racially discriminatory effect described herein, Commonwealth Defendants were aware of that effect before they took such actions, and such actions were repeatedly taken with such knowledge.

81. The Civil Rights Act of 1871, 42 U.S.C. § 1983, provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

82. The rights secured by Title VI, 42 U.S.C. §§ 2000d through 2000d-4a, and the regulations implementing Title VI for education programs or activities receiving federal financial assistance, 34 C.F.R. part 100, are rights, privileges or immunities secured by the laws within the meaning of 42 U.S.C. § 1983.

83. The Commonwealth Defendants' funding policies and practices, by discriminating against African-American, Hispanic, Asian and other minority students in the School District, harm the educational opportunities of the Student Plaintiffs in violation of the Title VI

implementing regulations as alleged in Count I above. The Commonwealth Defendants thereby have deprived the Student Plaintiffs, and the Organization Plaintiffs that represent the interests of such students, of rights, privileges, and immunities secured by the laws of the United States, in violation of 42 U.S.C. § 1983.

WHEREFORE, Plaintiffs respectfully pray that this Court:

1. Declare that the Commonwealth Defendants, through their funding policies and practices, discriminate against African-American, Hispanic, Asian and other minority students in the School District and the City, and thereby harm the Student and Organization Plaintiffs, the School District Plaintiffs and the City Plaintiffs, in violation of the Title VI administrative regulations promulgated by the United States Department of Education to implement the nondiscrimination requirements of Title VI;

2. Declare that the Commonwealth Defendants, through their funding policies and practices, deprive the Student Plaintiffs, and the Organization Plaintiffs that represent the interests of such students, of their rights, privileges and immunities secured by the laws of the United States, in violation of 42 U.S.C. §1983;

3. Enjoin the Commonwealth Defendants from continuing to implement a system of funding public schools that discriminates against the African-American, Hispanic, Asian, and other minority children enrolled in The School District of Philadelphia, and that thereby harms the Student and Organization Plaintiffs, the School District Plaintiffs and the City Plaintiffs;

4. Retain jurisdiction to enforce its declaratory and injunctive relief;

5. Award Plaintiffs their costs, including reasonable attorneys' fees;
and

6. Award such other relief as this Court deems necessary, effective and appropriate.

/S/

APPENDIX F

MOTION FOR LEAVE TO INTERVENE OF MATTHEW J. RYAN, ROBERT C. JUBELIRER, JESS M. STAIRS AND JAMES J. RHOADES

Representative Matthew J. Ryan, Speaker of the Pennsylvania House of Representatives; Senator Robert C. Jubelirer, President *Pro Tempore* of the Pennsylvania Senate; Representative Jess M. Stairs, Chairman of the Education Committee of the Pennsylvania House of Representatives; and Senator James J. Rhoades, Chairman of the Education Committee of the Pennsylvania Senate hereby move the Court for an order allowing them to intervene in this action on behalf of the defendants as provided in Fed. R. Civ. P. 24. Argument in support of this motion is provided in the accompanying brief. A proposed answer in intervention and a proposed form of order are attached.

May 5, 1998 Respectfully submitted,
KIRKPATRICK & LOCKHART LLP

/S/

BRIEF IN SUPPORT OF THE MOTION FOR LEAVE TO INTERVENE OF MATTHEW J. RYAN, ROBERT C. JUBELIRER, JESS M. STAIRS AND JAMES J. RHOADES

Representative Matthew J. Ryan, Speaker of the Pennsylvania House of Representatives; Senator Robert C. Jubelirer, President *Pro Tempore* of the Pennsylvania Senate; Representative Jess M. Stairs, Chairman of the Education Committee of the Pennsylvania House of Representatives; and Senator James J. Rhoades, Chairman of the Education Committee of the Pennsylvania Senate hereby present their brief in support of their motion for leave to intervene.[1]

I. Facts and Procedural Statement

On March 9, 1998, Plaintiffs filed their complaint in this Court.[2] The Defendants include Thomas J. Ridge, the Governor of Pennsylvania; Dr. James P. Gallagher, the

---

[1] The proposed intervenors do not waive any speech or debate immunity or any Eleventh-Amendment immunity they or the defendants may have. Further, in accordance with Fed. R. Civ. P. 24, the proposed intervenors have attached an answer. They concur in the defendants' motion to dismiss filed on May 4, 1998.

[2] Plaintiffs include parents of students in the Philadelphia School District; various Philadelphia community organizations, including the Black Clergy of Philadelphia and Vicinity, Philadelphia Branch NAACP, ASPIRA, Inc., of Pennsylvania, Parents Union for Public Schools, Citizens Committee on Public Education in Philadelphia and Parents United for Better Schools; various officials of the Philadelphia School District; the Philadelphia School District itself; Philadelphia Mayor Edward G. Rendell and the City of Philadelphia itself.

chair of the Pennsylvania Board of Education; Eugene W. Hickok, the Pennsylvania Secretary of Education; and Barbara Hafer, the Pennsylvania Treasurer.

Plaintiffs assert the means by which the Commonwealth of Pennsylvania calculates school funding discriminates against the students of the Philadelphia School District on the basis of either race or national origin.

In the complaint, Plaintiffs describe the roles of the various Defendants as follows:

> 27. Defendant Governor Thomas J. Ridge has all powers specified and necessarily implied by the Constitution and laws of Pennsylvania, including the power and obligation to recommend education spending to the General Assembly, approve legislative appropriations, and supervise the executive departments that administer regulations and programs governing the School District. ...
>
> 28. Defendant Dr. James P. Gallagher, as Chairperson of the State Board of Education, has all powers specified and necessarily implied by the laws of Pennsylvania, including, inter alia, powers and duties pertaining to school districts pursuant to 26 [sic] P.S. §§ 2601 B, et seq. and is barred from carrying out any of his duties in a way that violates the Thirteenth or Fourteenth Amendment to the United States Constitution or any federal statute or regulation. ...

> 29. Defendant Secretary of Education Eugene W. Hickok is a Constitutional officer under Article IV section 8 of the Pennsylvania Constitution and has all powers specified and necessarily implied by the Constitution and laws of Pennsylvania, including responsibility for administration and supervision of the Commonwealth Department of Education ("DOE"). ...
>
> 30. Defendant State Treasurer Barbara Hafer is a constitutional officer under Article IV section 1 of the Pennsylvania Constitution and has all powers specified and necessarily implied by the Constitution and laws of Pennsylvania...The Treasury is responsible for, inter alia, the disbursement of funds, both federal and state, for purposes of education. ...

The proposed intervenors fall into two categories. Matthew J. Ryan is the Speaker of the Pennsylvania House of Representatives, one house of Pennsylvania's bicameral legislature. Robert C. Jubelirer is the President *Pro Tempore* of the Pennsylvania Senate, the other house of the legislature. In their respective roles, Speaker Ryan and Senator Jubelirer are the duly elected presiding officers of the respective chambers of the legislative branch of the Pennsylvania government. PA. CONST. art. II, §§ 1, 9. Under the Pennsylvania Constitution, the General Assembly is charged with appropriating funds, including those for education. PA. CONST. art. III, § 14 & 24 and art. VIII, § 13. Section 14 of Article 3 provides that

> The General Assembly shall provide for the maintenance and support of a thorough and

efficient system of public education to serves the needs of the Commonwealth.

Any change in the means by which school districts receive state funding in Pennsylvania would necessarily affect the legislature in that school funding is statutory in nature and an expenditure in one area affects the legislature's ability to use those funds in any other area.

This action represents the second one initiated by most of the plaintiffs with regard to state funding of the Philadelphia School District. On February 24, 1997, a group including many of the plaintiffs in this action filed a petition for review in the Commonwealth Court of Pennsylvania. The Commonwealth Court described the claim as follows:

> Petitioners argue, in essence, that because the School District operated in an urban environment, it is required to educate a disproportionate number of the state's students who live in poverty, and its students have unique educational needs, which require the expenditure of greater financial resources. Because the School District operates in the financially over-burdened urban area with a disproportionately high tax burden, Petitioners claim that the School District is unable to rely on the local tax base to meet the needs of its students. As a result, Petitioners allege that the Pennsylvania General Assembly should be compelled to appropriate more funds to the School District pursuant to the mandate contained in Article 3, Section 14 of the Pennsylvania Constitution.

Marrerro v. Commonwealth of Pennsylvania, No. 182 M.D. 1997 (March 2, 1998) (Tab 2 in Defendants' Appendix of Exhibits Cited in Memorandum in Support of Defendants' Motion to Dismiss Complaint). In the Commonwealth Court action, the plaintiffs included as a defendant Speaker Ryan.[3]

On March 2, 1998, the *en banc* Commonwealth Court determined that the petition presented a non-justiciable political question. *Id.* One week later, Plaintiffs filed the action now pending in this Court. The *Marrerro* plaintiffs have taken an appeal as of right to the Supreme Court of Pennsylvania.

Jess M. Stairs and James J. Rhoades are, respectively, the Chairs of the House Committee on Education and the Senate Committee on Education. In those roles, they are *ex officio* members of the State Board of Education. *See* 24 P.S. § 26-26-2602-B. In addition, their respective committees give first consideration to any legislative issues related to education in the Commonwealth.

II. Issues Presented

A. Whether Representative Matthew J. Ryan and Senator Robert C. Jubelirer, as Speaker of the Pennsylvania House of Representatives and President *Pro Tempore* of the Pennsylvania Senate, respectively, have a sufficient interest in this litigation to warrant intervention.

[Suggested answer: Yes.]

---

[3] Plaintiffs also sued the President *Pro Tempore* but mistakenly identified as that person the Lieutenant Governor rather than Senator Jubelirer.

B. Whether Representative Jess M. Stairs and Senator James J. Rhoades, as Chairs of the House and Senate Education Committees, respectively, have a sufficient interest in this litigation to warrant intervention.

[Suggested answer: Yes.]

C. Whether Representative Jess M. Stairs and Senator James J. Rhoades, as *ex officio* members of the State Board of Education, have a sufficient interest in this litigation to warrant intervention.

[Suggested answer: Yes.]

D. Whether the interests of the proposed intervenors are sufficiently distinct from those of the existing defendants to warrant intervention.

[Suggested answer: Yes.]

E. Whether, in the alternative, the Court should grant leave for permissive intervention because of the unique roles of the proposed intervenors.

III. Law and Discussion

Federal Rule of Civil Procedure 24 governs intervention, both as of right and permissive. Rule 24(a)(2) allows intervention of right when

> the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that

> interest, unless the applicant's interest is adequately protected by existing parties.

The U.S. Court of Appeals for the Third Circuit has set forth the standards for intervention as of right as (1) that the application is timely; (2) that the applicant has a sufficient interest in the litigation; (3) that the applicant's interest may be affected or impaired, as a practical matter, by the disposition of the action; and (4) that the applicant's interest is not adequately represented by an existing party to the litigation. *Brody by and through Sugzdinis v. Spang*, 957 F.2d 1108, 1115 (3d Cir. 1992).

With regard to all four proposed intervenors, there can be no question that the application is timely. The proposed intervenors filed their motion to intervene on May 6, 1998, only two days after the Defendants were required to file their response (the date for the Defendants' response to the complaint was extended by stipulation to May 4, 1998). The Court has taken no action in the case, the existing Defendants have filed a motion to dismiss (in which proposed intervenors concur) and the parties have yet to conduct any discovery.

A. Speaker Ryan and Senator Jubelirer have several direct interests in this litigation and those interests would be affected or impaired as a practical matter by the disposition of this litigation.

Speaker Ryan and Senator Jubelirer, as the duly elected presiding officers of the two houses of the Pennsylvania General Assembly, have several interests in this litigation.

First, and foremost, the case presents a question of whether the Commonwealth of Pennsylvania has

established a proper funding plan for its public schools. The Pennsylvania Constitution vests authority for appropriations in the General Assembly upon submission of annual budgets by the Governor. PA. CONST. art. VIII, §§ 12, 13. No funds can be paid out of the Commonwealth's treasury that the General Assembly has not appropriated by legislation. PA. CONST. art. III, §24. In their complaint, Plaintiffs assert that the basis for liability of the Governor is that he has "the power and obligation to recommend education spending to the General Assembly [and] approve legislative appropriations..." Complaint at ¶ 27. Those assertions correctly recognize that, under the Pennsylvania Constitution, the Governor may only ***recommend*** education spending to the General Assembly and ***approve*** legislative appropriations. The General Assembly has a role in education policy and spending (and other appropriations) concomitant with and in many respects more crucial than that of the Governor. Indeed, the Governor cannot appropriate funds and cannot spend funds without the approval of the legislature. Were the Court to put in place the remedies Plaintiffs have requested in their complaint, the result would be to force a reallocation of funds over which the General Assembly has constitutional responsibility. Accordingly, the General Assembly has a keen interest financially in the matter that is the subject of this litigation and its elected leaders should be allowed to intervene.

Moreover, the Pennsylvania Constitution expressly imposes on the General Assembly the obligation to provide a "thorough and efficient system of public education to serves the needs of the Commonwealth." PA. CONST. art. III, § 14. The General Assembly has established by statute the rules by which the basic education funds are distributed. It is this funding decision that Plaintiffs challenge. Accordingly, pr0posed intervenors Ryan and

Jubelirer, as leaders of the General Assembly, have a legal interest in this litigation because of the obligations imposed on the General Assembly by the state constitution. *See generally Harris v. Pernsley*, 820 F.2d 592, 602 (3d Cir. 1987) (affirming denial of a district attorney's motion to intervene in a prison overcrowding case because his constitutional duties were not so broad as he argued but allowing that "[w]e must respect the boundaries that the Commonwealth has chosen to draw as to the responsibilities of its public officials."). In this case, as contrasted with *Harris*, the state constitution squarely vests authority in the General Assembly for school funding. I other words, were the Court to enjoin the Commonwealth from using certain funding mechanisms with regard to the Philadelphia School District, the Court would necessarily be restricting (or directing) the General Assembly in its constitutional role.

Similarly, any determination regarding appropriation to the Philadelphia School District would have a direct impact on the General Assembly's ability to use the same funds for other initiatives. AS noted, the Pennsylvania Constitution places in the hands of the General Assembly the "purse strings" of the state government and, of course, the contents of that purse are not infinite. And further, no funds can be paid out of the treasury unless they have been approved by the General Assembly.

The interests of Speaker Ryan and Senator Jubelirer are intertwined with the interests that would be affected or impaired by the disposition of this litigation. As noted, Speaker Ryan and Senator Jubelirer lead the coordinate branch of the Pennsylvania government responsible for appropriation of state funds and for maintenance of the public education system. The resolution of this litigation,

particularly if Plaintiffs obtain the remedies they seek, would substantially affect the General Assembly's ability to make decisions not only about funding for the Philadelphia School District but about funding for the other 500 school districts in the Commonwealth. Moreover, a judicial decree regarding allocation of some part of the Commonwealth's budget would necessarily affect the General Assembly's ability to exercise its constitutional mandate to appropriate funds in the best interests of the citizens of the Commonwealth.

B. Representative Stairs and Senator Rhoades have two direct interests in this litigation and those interests could be substantially affected or impaired as a practical matter by the disposition of this litigation.

As an initial matter, Representative Stairs and Senator Rhoades, as members of the Pennsylvania General Assembly, share the interests of Speaker Ryan and Senator Jubelirer described above. Moreover, they have a more direct interest than other members of the General Assembly because they chair the House and Senate Education Committees, respectively. The General Assembly's compliance with its constitutional responsibilities regarding public education begins in those committees.

Further, both of these proposed intervenors are, by statute, *ex officio* members of the State Board of Education (the "State Board"). *See* 24 P.S. § 26-2602-B. As noted above, Plaintiffs have joined Dr. James P. Gallagher, the chair of the State Board, because in that role he has "all powers specified and necessarily implied by the laws of Pennsylvania, including, inter alia, powers and duties pertaining to school districts pursuant to 26 [sic] P.S. §§ 2601 B, et seq. ..." Complaint at ¶ 28. Notably, the statutory provision that establishes the State Board also

requires an affirmative vote of a majority of members present "in order to take action adopting statements of policy, standards, rules and regulations." 24 P.S. § 26-2602-B(b). In other words, Plaintiffs have brought suit against one member of a board that must act by majority vote. The other members of that board have the same interest (and the same responsibilities) Plaintiffs attribute to Dr. Gallagher.

In addition, as with Speaker Ryan and Senator Jubelirer in their legislative roles, the interests of Representative Stairs and Senator Rhoades as *ex officio* members of the State Board would be affected, if not impaired, by the disposition of this litigation. As Plaintiffs have acknowledged by joining Dr. Gallagher, the State Board is instrumental in the formulation of educational policy in the Commonwealth; a Court determination about the funding formula applied by the Commonwealth would necessarily impose certain constraints on all voting members of the State Board as they carry on their statutory duties.

C. *The interests of the proposed intervenors would not be adequately addressed by the current defendants.*

The final factor in the Rule 24(a) analysis is whether the interests of the applicant are adequately represented by the existing parties.

While Plaintiffs have named a number of Commonwealth officials as defendants in this action, all are members of the executive branch or are appointees of

the Governor.[4] For example, as Plaintiffs have acknowledged, Governor Ridge is the Chief Executive

---

[4] It is true that some cases have suggested that proposed intervenors must meet a higher standard with regard to this element when the state itself is a defendant. *See Delaware Valley Citizens' Council v. Commonwealth of Pennsylvania,* 674 F.2d 970, 973 (3d Cir. 1980). However, such a rule has no application in this case because (1) it is not the Commonwealth itself but certain Executive Branch officers who have been joined and (2) those officers have been joined pursuant to *Ex Parte Young,* 209 U.S. 123 (1908). The rationale of those cases applying a higher standard is that the state acts as *parens patriae* and, therefore, may be deemed to represent the interests of all citizens of the state. *Delaware Valley Citizens' Council,* 674 F.2d 970 at 973. By contrast, ill this case, Plaintiffs have not brought suit against the Commonwealth but are, instead, proceeding under what has come to be known as the "fiction" of *Ex Parte Young:*

> If the act which the state attorney general seeks to enforce be a violation of the Federal Constitution, the officer, in proceeding under such enactment, comes into conflict with the superior authority of that Constitution, *and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct."*

209 U.S. at 160 (emphasis added). To apply the principle described in *Delaware Valley Citizens' Council* to a case in which state officials are sued under the doctrine of *Ex Parte Young* would be to ignore the foundation upon which *Ex Parte Young* was predicated, which was that a state actor who conducts himself in derogation of the federal Constitution may be considered stripped of his official role and, thereby, subject to suit. An official who is subject to suit only because he has been "stripped of his official or representative character" cannot be

Officer of the Commonwealth and, in that role, appointed the Secretary of Education and the chair of the State Board of Education (two other defendants). *See* Complaint at ¶ 28. The remaining defendant, Treasurer Hafer, is a member of the executive branch of the state government. PA. CONST. art. IV, § 1 ("The Executive Department of this Commonwealth shall consist of a Governor, Lieutenant Governor, Attorney General, Auditor General, State Treasurer, and Superintendent of Public Instruction..."). Critically, despite the fact that the Pennsylvania Constitution imposes the duty to maintain and support public education squarely on the General Assembly, that body is not represented among the defendants in this litigation.[5]

In the end, the issue may be framed simply. Despite the constitutional commitment of the duty to maintain public education and to appropriate funds to the General Assembly, there is no representative of that body participating in this lawsuit who can give voice to that body's concerns and arguments. Indeed, the plaintiffs in the *Marrero* case now pending in the Pennsylvania state courts (many of whom are plaintiffs in this action) tacitly admitted the need for the legislature to be represented in any litigation involving the Philadelphia School District when they asserted in their complaint that

---

presumed to act as *parens patriae*. Such a conclusion would be illogical.

[5] Notably, under the Commonwealth Attorneys Act, 72 Pa.C.S. §§ 732-101, *et seq.*, the executive-branch defendants may be represented in this action by either the Attorney General or the Governor's General Counsel. *See* 72 Pa.C.S. §§ 732-204 and 732.301. The Attorney General and the General Counsel are not statutorily authorized to represent the General Assembly. *Id.*

> 10. Defendant General Assembly of the Commonwealth of Pennsylvania is established by Article 2, Section 1 of the Pennsylvania Constitution. Article 3, Section 14 of the Pennsylvania Constitution ("the Education Clause") requires the General Assembly to establish a system of public schools and to provide a thorough and efficient system of public schools to serve the needs of the Commonwealth.
>
> ****
>
> 12. Defendant Matthew J. Ryan is Speaker of the House of Representatives, which is charged with responsibility under the Education Clause...

State Complaint (Tab 1 in Defendants' Appendix of Exhibits Cited in Memorandum in Support of Defendants' Motion to Dismiss Complaint).

D. If the Court does not grant intervention of right, it should exercise its discretion to allow permissive intervention.

Although the four proposed intervenors believe they have an entitlement to intervene under Rule 24(a)(2), they would ask that, if the Court disagrees, it grant them permissive intervention. Permissive intervention requires only that the proposed intervenor's "claim or defense and the main action have a question of law or fact in common." Fed. R. Civ. P. 24(b)(2). Permissive intervention is within the discretion of the district court.

As noted above, at least one of the proposed intervenors (Speaker Ryan) and the entire General Assembly are respondents in an action pending in the

Pennsylvania courts (the Commonwealth Court sustained preliminary objections and dismissed the action on March 2, 1998, but the plaintiffs in that action have appealed to the Pennsylvania Supreme Court). While the state-court action sought relief based on the state constitution, the facts giving rise to that action and those giving rise to this one are almost precisely the same. Indeed, several of the plaintiffs in this case are plaintiffs in that case (*e.g.*, Philadelphia Branch NAACP; ASPIRA, Inc., of Pennsylvania; the School District of Philadelphia; and the City of Philadelphia). Accordingly, rather than face potentially inconsistent declarations of the duties of the General Assembly without having had a voice in this federal action, the proposed intervenors should be granted leave to intervene at least permissively so that they may articulate to the Court the unique perspective of the legislative branch of the Pennsylvania government.

IV. Conclusion

Therefore, Representative Matthew J. Ryan, Senator Robert C. Jubelirer, Representative Jess M. Stairs and Senator James J. Rhoades respectfully request that the Court grant them leave to intervene in this action on behalf of the defendants.

May 5, 1998

Respectfully submitted,
KIRKPATRICK & LOCKHART LLP

/S/

ORDER OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

AND NOW, this 3rd day of June 1998, upon consideration of the Uncontested Motion to Intervene by Movant Matthew J. Ryan, Movant Robert C. Jubelirer, Movant Jess M. Stairs, and Movant James J. Rhoades (Docket No. 8), IT IS HEREBY ORDERED that the Motion is GRANTED.[1]

IT IS FURTHER ORDERED that Movant Matthew J. Ryan, Movant Robert C. Jubelirer, Movant Jess M. Stairs, and Movant James J. Rhoades are GRANTED leave to intervene on behalf of the defendants.

BY THE COURT:

/S/
HERBERT J. HUTTON, J.

---

[1] On May 5, 1998, the movants served this motion on the parties. As of the date of this Order, the parties had not yet responded. Because the parties in this case failed to make a timely response to this motion, the Court treats the motion as uncontested pursuant to Rule 7.1(c) of the Local Rules of Civil Procedure of the United States District Court for the Eastern District of Pennsylvania. E.D. Pa. R. Civ. P. 7.1 (c). Rule 7.1 (c) states that, "any party opposing the motion shall serve a brief in opposition, together with such answer or other response which may be appropriate, within fourteen (14) days after service of the motion and supporting brief. In the absence of a timely response, the motion may be granted as uncontested...." Id.

Appendix G

DEFENDANT-INTERVENOR REPRESENTATIVE MATTHEW J. RYAN'S RESPONSE & OBJECTIONS TO PLAINTIFF SCHOOL DISTRICT OF PHILADELPHIA'S FIRST SET OF INTERROGATORIES

Defendant-Intervenor Representative Matthew J. Ryan ("Representative Ryan") responds and objects to the Plaintiffs' First Set of Interrogatories as follows.

GENERAL OBJECTIONS

The following general objections are incorporated by reference into each response set forth below.

1. Representative Ryan objects to the definitions and instructions accompanying these discovery materials to the extent that such definitions and instructions impose obligations on him beyond those imposed by the Federal Rules of Civil Procedure.

2. Representative Ryan objects to the definitions and instructions accompanying this discovery to the extent such definitions and instructions purport to require the production of any material or information subject to attorney-client privilege, attorney work-product privilege, legislative (speech or debate) privilege, deliberative process privilege, or any other applicable privilege.

3. Representative Ryan objects to producing any information not relevant to this litigation.

4. Representative Ryan objects to producing any information or document that is publicly available.

5. Representative Ryan objects to the requests to the extent that they are duplicative (identical requests were directed to each individual defendant and each defendant-intervenor), overly broad, unduly burdensome and seek information which is not reasonably calculated to lead to the discovery of admissible evidence.

6. Representative Ryan objects to the interrogatories because the interrogatories seek information from him that concerns matters within the sphere of legitimate legislative authority (including the investigation, consideration and enactment of legislation related to education funding) and he is protected from having to respond to discovery regarding those matters by the legislative privilege. The legislative privilege also protects Representative Ryan against the interference with his duties in connection with and the disruption of the legislative process, which the identification of the requested information and documents would engender.

7. Representative Ryan objects to the interrogatories to the extent that they seek the identity of documents and communications protected in federal civil actions by the deliberative process privilege.

8. Representative Ryan objects to Interrogatory Instruction No. 6, which seeks the production of a privilege log. As noted in General Objection No. 6, the legislative privilege protects Representative Ryan from having to disclose information related to matters within the sphere of legitimate legislative authority. The legislative privilege protects against interference with activities within the legislative process and disruption of the legislative process, which the identification of the requested information would engender.

CONDITIONS

The following responses are provided without waiving the above general objections or any specific objections hereinafter set forth. Further, the following responses are made without waiving:

1. Objections to the use of the responses on the grounds of competency, relevancy, materiality, privilege or inadmissibility, or for any other reason in any hearing or trial in this or any other matter; and

2. Objections to any demand for further responses with respect to the information provided herein.

3. Discovery is continuing and additional responsive and relevant (non-privileged) information and documents may be identified over time. Representative Ryan preserves the right at any time to revise, correct, supplement, clarify and/or amend any responses furnished.

RESPONSES

1. Identify each agency, department, legislative body, committee, or other instrumentality of the Commonwealth involved in any aspect of funding for public education, including the names of the officials currently in charge of such agency, department, legislative body, committee, or instrumentality, the names of officials who have been in charge of such agency, department, legislative body, committee, or instrumentality at any time since 1991, and describe the role of such agency, department, legislative body, committee, or other instrumentality in determining or allocating funding for public education.

Response:

Representative Ryan incorporates the General Objections set forth above. Representative Ryan specifically objects to this Interrogatory because it seeks information that is publicly available. Representative Ryan further specifically objects to this Interrogatory because the legislative privilege protects him from responding to discovery seeking information related to matters within the legislative process. Further, the legislative privilege protects against interference with and disruption of the legislative process, which the identification of the requested information would engender. Representative Ryan also objects to this Interrogatory because it is over broad, seeking information that is not relevant to this case and outside of any relevant time frame.

2. Identify each person retained or employed by the Department of Education, the Board of Education, the Governor's Office, the Office of the Budget, or any legislative body or committee, who has or had knowledge of or responsibility for any aspect of funding for public education and describe that person's involvement in funding for public education.

Response:

Representative Ryan incorporates the General Objections set forth above. Representative Ryan specifically objects to this Interrogatory because it seeks information that is publicly available and/or available, in large part, from others. Representative Ryan further specifically objects to this Interrogatory because the legislative privilege protects him from responding to discovery seeking information related to matters within the

legislative process. Further, the legislative privilege protects against interference with and disruption of the legislative process, which the identification of the requested information would engender. Representative Ryan also objects to this Interrogatory because it is over broad, seeking information that is not relevant to this case and outside of any relevant time frame.

3. Identify each expert you expect to call as a witness at trial, state the subject matter on which the expert is expected to testify, and state the substance of the facts and opinions to which the expert is expected to testify and the grounds for each opinion.

Response:

Representative Ryan incorporates the General Objections as set forth above. Without waiving any objection, Representative Ryan has not yet determined if he will call any expert witness at the trial of this case.

4. Describe your document retention policies and practices for documents concerning funding for public education, including (a) the location of such documents; (b) the custodian of such documents; (c) the number of years such documents are retained.

Response:

Representative Ryan incorporates the General Objections set forth above. Representative Ryan further specifically objects to this Interrogatory because the legislative privilege protects him from responding to discovery seeking information related to matters within the legislative process. Further, the legislative privilege protects against interference with and disruption of the

legislative process, which the identification of the requested information would engender. Representative Ryan also objects to this Interrogatory because it is over broad, seeking information that is not relevant to this case and outside of any relevant time frame. Without waiving any objection, Representative Ryan has no document retention policy or practice for documents concerning public education and retains no documents concerning funding for public education.

5. Identify all electronic databases you maintain that contain information regarding appropriations, revenues, expenditures, racial composition, poverty levels, density levels, or performance levels of school districts, and describe the maintenance of such databases, including (a) how many years you maintain such databases; (b) the location of such databases; (c) how information is obtained for such databases, including, but not limited to, information obtained from school districts in Pennsylvania; (d) how often data for such databases is received from school districts or other sources; (e) in what form data for such databases is received; (f) how data is reviewed and entered into such databases; and (g) who enters data into such databases.

Response:

Representative Ryan incorporates the General Objections set forth above. Representative Ryan further specifically objects to this Interrogatory because the legislative privilege protects him from responding to discovery seeking information related to matters within the legislative process. Further, the legislative privilege protects against interference with and disruption of the legislative process, which the identification of the requested information would engender. Representative

Ryan also objects to this Interrogatory because it is over broad, seeking information that is not relevant to this case and outside of any relevant time frame. Without waiving any objection, Representative Ryan maintains no electronic database with respect to the information listed in this Interrogatory.

6. For each year from 1991-92 through 1999-2000, identify all data or documents reflecting racial or ethnic composition of school districts in Pennsylvania, including but not limited to, comparisons among school districts or groups of students, based on race or ethnicity or concerning funding for public education.

Response:

Representative Ryan incorporates the General Objections set forth above. Representative Ryan further specifically objects to this Interrogatory because the legislative privilege protects him from responding to discovery seeking information related to matters within the legislative process. Further, the legislative privilege protects against interference with and disruption of the legislative process, which the identification of the requested information would engender. Representative Ryan objects to this Interrogatory because it is over broad, seeking information that is not relevant to this case and outside of any relevant time frame. Representative Ryan also objects to this Interrogatory because it seeks the production of documents or information that is publicly available. Without waiving any objection, Representative Ryan possess no data or documents reflecting racial or ethnic composition of school districts in Pennsylvania.

7. Identify every instance and any documents in which you saw or were made aware of a calculation or

comparison that showed the allocation to school districts, including, but not limited to, Philadelphia or any other school district(s) with more that fifty percent minority enrollment, or to students in Pennsylvania, of (a) BEF funding; (b) Commonwealth treasury funding; or (c) total revenues.

Response:

Representative Ryan incorporates the General Objections set forth above. Representative Ryan further specifically objects to this Interrogatory because the legislative privilege protects him from responding to discovery seeking information related to matters within the legislative process. Further, the legislative privilege protects against interference with and disruption of the legislative process, which the identification of the requested information would engender. Representative Ryan also objects to this Interrogatory because it is over broad, seeking information that is not relevant to this case and outside of any relevant time frame. Without waiving any objection, Representative Ryan is aware of no calculation or comparison that he has seen or been made aware of, outside those in documents filed with the court in this litigation, "that showed the allocation to school districts, including, but not limited to, Philadelphia or any other school district(s) with more than fifty percent minority enrollment, or to students in Pennsylvania, of (a) BEF funding; (b) Commonwealth treasury funding; or (c) total revenues."

8. For each year from 1991-92 through 1999-2000, identify and describe the Commonwealth's goals and objectives for funding for public education.

Response:

Representative Ryan incorporates the General Objections set forth above. Representative Ryan specifically objects to this Interrogatory because the legislative privilege protects him from responding to discovery seeking information related to matters within the legislative process. Further, the legislative privilege protects against interference with and disruption of the legislative process, which the identification of the requested information would engender. Representative Ryan also objects to this Interrogatory because it is over broad, vague, and ambiguous. Representative Ryan further objects to this Interrogatory in that the information it seeks, the identification and description of the Commonwealth's goals and objectives for funding for public education, are publicly available and conclusions of law, appearing in the Constitution and laws of the Commonwealth.

9. For each year from 1991-92 through 1999-2000, identify and describe (a) each category of Commonwealth treasury funding for public education and describe the rationale for each category; and (b) each funding formula, each component of each funding formula, or each criterion that influences or determines the level of funding for each category of Commonwealth treasury funding for public education (including BEF and non-BEF, where applicable) and describe the rationale for each funding formula, component, or criterion.

Response:

Representative Ryan incorporates the General Objections set forth above. Representative Ryan specifically objects to this Interrogatory because the legislative privilege protects him from responding to

discovery seeking information related to matters within the legislative process. Further, the legislative privilege protects against interference with and disruption of the legislative process, which the identification of the requested information would engender. Representative Ryan also objects to this Interrogatory because it is over broad and unduly burdensome in that it includes years not relevant to the claims in this litigation, and because it seeks information that is publicly available in laws of the Commonwealth and that constitutes conclusions of law.

10. For each year from 1991-92 through 1999-2000, describe the process for recommending and deciding the amount of Commonwealth treasury funds to be provided to each school district in Pennsylvania in support of public education.

Response:

Representative Ryan incorporates the General Objections set forth above. Representative Ryan specifically objects to this Interrogatory because the legislative privilege protects him from responding to discovery seeking information related to matters within the legislative process. Further, the legislative privilege protects against interference with and disruption of the legislative process, which the identification of the requested information would engender. Representative Ryan also objects to this Interrogatory because it is over broad and unduly burdensome in that it includes years not relevant to the claims in this litigation, and because it seeks information that is publicly available in the Constitution and laws of the Commonwealth.

11. For each school year from 1991-92 through 1999-2000, identify all information you considered in the

process of making recommendations for or decisions regarding funding for public education, including, but not limited to, preparation and consideration of the Governor's budget proposal to the legislature.

Response:

Representative Ryan incorporates the General Objections set forth above. Representative Ryan specifically objects to this Interrogatory because the legislative privilege protects him from responding to discovery seeking information related to matters within the legislative process. Further, the legislative privilege protects against interference with and disruption of the legislative process, which the identification of the requested information would engender. Representative Ryan also objects to this Interrogatory because it is over broad and unduly burdensome in that it includes years not relevant to the claims in this litigation, and because it seeks information that is publicly available in laws of the Commonwealth. Representative Ryan further objects to this Interrogatory because it seeks information protected from discovery by the deliberative process privilege.

12. Describe each change proposed and each change implemented to any component of funding for public education, including, but not limited to, BEF, every year since 1991-92 and why you proposed or implemented such change.

Response:

Representative Ryan incorporates the General Objections set forth above. Representative Ryan specifically objects to this Interrogatory because the legislative privilege protects him from responding to

discovery seeking information related to matters within the legislative process. Further, the legislative privilege protects against interference with and disruption of the legislative process, which the identification of the requested information would engender. Representative Ryan also objects to this Interrogatory because it is over broad and unduly burdensome in that it includes years not relevant to the claims in this litigation, and because it seeks information that is publicly available in laws of the Commonwealth. Representative Ryan further specifically objects to the request that he describe why he proposed or implemented such change because, in addition to being protected by the legislative privilege, such request may involve information protected from discovery by the deliberative process privilege.

13. For each year from 1991-92 through 1999-2000, identify any and all communications between any defendant and (a) any other Defendant (b) any member, officer, committee, group, legislator, or other person or entity in the Pennsylvania General Assembly, or (c) any Executive Branch offices or representatives with responsibility for funding for public education, concerning (i) any proposed or actual changes in any public education funding formula(s); (ii) the reason(s) for any changes to any public education funding formula(s); and (iii) the anticipated or actual effect(s) of any changes to any public education funding formula(s).

Response:

Representative Ryan incorporates the General Objections set forth above. Representative Ryan specifically objects to this Interrogatory because the legislative privilege protects him from responding to discovery seeking information related to matters within the

legislative process. Further, the legislative privilege protects against interference with and disruption of the legislative process, which the identification of the requested information would engender. Representative Ryan also objects to this Interrogatory because it is over broad and unduly burdensome in that it includes years not relevant to the claims in this litigation. Representative Ryan further specifically objects to the request that he describe why he proposed or implemented such change because, in addition to being protected by the legislative privilege, such request may involve information protected from discovery by the deliberative process privilege.

14. Identify each year in which BEF and/or Commonwealth treasury revenues for the Philadelphia school district increased by a lesser percentage than they increased on average for the other school districts in Pennsylvania, and state what factors caused the difference and why.

Response:

Representative Ryan incorporates the General Objections set forth above. Representative Ryan specifically objects to this Interrogatory because the legislative privilege protects him from responding to discovery seeking information related to matters within the legislative process. Further, the legislative privilege protects against interference with and disruption of the legislative process, which the identification of the requested information would engender. Representative Ryan also objects to this Interrogatory because it is over broad and unduly burdensome in that it includes years not relevant to the claims in this litigation, and because it seeks information that is publicly available or derivable from public information.

15. For each year from 1991-92 through 1999-2000, identify the activities for which school districts may spend BEF payments.

Response:

Representative Ryan incorporates the General Objections set forth above. Representative Ryan specifically objects to this Interrogatory because the legislative privilege protects him from responding to discovery seeking information related to matters within the legislative process. Further, the legislative privilege protects against interference with and disruption of the legislative process, which the identification of the requested information would engender. Representative Ryan also objects to this Interrogatory because it is over broad and unduly burdensome in that it includes years not relevant to the claims in this litigation, because it seeks information that is publicly available or derivable from public information, including the laws and regulations of the Commonwealth of Pennsylvania, and because it seeks information in the possession of others, including the Pennsylvania Department of Education and the 501 local school districts, including the School District of Philadelphia.

16. Describe what measure(s) of poverty are used in any component of Commonwealth treasury revenues for funding for public education, the sources of the data used in calculating such measures of poverty, how such measure(s) of poverty are used, and why.

Response:

Representative Ryan incorporates the General Objections set forth above. Representative Ryan

specifically objects to this Interrogatory because the legislative privilege protects him from responding to discovery seeking information related to matters within the legislative process. Further, the legislative privilege protects against interference with and disruption of the legislative process, which the identification of the requested information would engender. Representative Ryan also objects to this Interrogatory because it is over broad and unduly burdensome in that it includes years not relevant to the claims in this litigation, because it seeks information that is publicly available or derivable from public information, including the laws and regulations of the Commonwealth of Pennsylvania, and because it seeks information in the possession of others, including the Pennsylvania Department of Education and the 501 local school districts, including the School District of Philadelphia.

17. Describe the process by which the Commonwealth requests and receives federal financial assistance for public education and identify and describe all types of federal financial assistance the Commonwealth has received for public education since 1991-92.

Response:

Representative Ryan incorporates the General Objections set forth above. Representative Ryan specifically objects to this Interrogatory because the legislative privilege protects him from responding to discovery seeking information related to matters within the legislative process. Further, the legislative privilege protects against interference with and disruption of the legislative process, which the identification of the requested information would engender. Representative Ryan also objects to this Interrogatory because it is over

broad and unduly burdensome in that it includes years not relevant to the claims in this litigation, because it seeks information that is publicly available or derivable from public information, including the laws and regulations of the Commonwealth of Pennsylvania and the United States of America, and because it seeks information in the possession of others, including the Departments of Education of the Commonwealth and the United States.

18. For the period from 1991-92 to the present, identify (a) all documents you submitted to the federal government under Title VI of the Civil Rights Act, 42 U.S.C. §20001 [sic], et seq., (b) who signed such submissions, and (c) what information was reviewed or relied upon before providing assurances under Title VI.

Response:

Representative Ryan incorporates the General Objections set forth above. Representative Ryan specifically objects to this Interrogatory because the legislative privilege protects him from responding to discovery seeking information related to matters within the legislative process. Further, the legislative privilege protects against interference with and disruption of the legislative process, which the identification of the requested information would engender. Representative Ryan also objects to this Interrogatory because it is over broad and unduly burdensome in that it includes years not relevant to the claims in this litigation, because it seeks information that is publicly available or derivable from public information and because it seeks information in the possession of others, including the Departments of Education of the Commonwealth and the United States. Without waiving any objection, Representative Ryan submitted no documents to the federal government under

Title VI of the Civil Rights Act and possesses no information concerning the other parts of this Interrogatory.

19. Describe each and every basis for the contention that "[t] here have been increases in the BEF funding for the Philadelphia public schools in the two years since the figures set forth in the Complaint," see Memorandum of Law in Support of Defendants' Motion for Summary Judgment at 3, and identify each document that supports this assertion.

Response:

Representative Ryan incorporates the General Objections set forth above. Representative Ryan specifically objects to this Interrogatory in that the referenced contention was not made by Representative Ryan or any other Defendant-Intervenor and/or their respective counsel. Representative Ryan also objects to this Interrogatory in that the information supporting/relating to the contention is publicly available and in the possession of others, including the School District of Philadelphia.

20. Describe each and every basis for the contention that "the Commonwealth system for funding public education has also changed" over the last two years, see Memorandum of Law in Support of Defendants' Motion for Summary Judgment at 3, and identify each document that supports this assertion.

Response:

Representative Ryan incorporates the General Objections set forth above. Representative Ryan specifically objects to this Interrogatory in that the

referenced contention was not made by Representative Ryan or any other Defendant-Intervenor and/or their respective counsel. Representative Ryan also objects to this Interrogatory in that the system for funding public education in Pennsylvania is statutory and, accordingly, information related to this contention is in the laws of Pennsylvania, which are publicly available.

March 29, 2000
Respectfully submitted,

/S/

VERIFICATION

I verify that the foregoing responses made to Plaintiff School District of Philadelphia's First Set of Interrogatories are true and correct to the best of my knowledge, information and belief. This verification is made subject to the provisions of 28 U.S.C. §1746.

March 24, 2000

/S/

Representative Matthew J. Ryan

APPENDIX H

LEGISLATIVE LEADERS' RESPONSE & OBJECTIONS TO PLAINTIFFS' FIRST SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS

Defendant-Intervenors Representative Matthew J. Ryan, Speaker of the Pennsylvania House of Representatives; Senator Robert C. Jubelirer, President *Pro Tempore* of the Pennsylvania Senate; Representative Jess M. Stairs, Chairman of the Education Committee of the Pennsylvania House of Representatives; and Senator James J. Rhoades, Chairman of the Education Committee of the Pennsylvania Senate ("Legislative Leaders") collectively respond and object to the Plaintiffs' First Set of Requests for Production of Documents as follows.

GENERAL OBJECTIONS

The following general objections are incorporated by reference into each response set forth below.

1. Legislative Leaders object to the definitions and instructions accompanying these discovery materials to the extent that such definitions and instructions impose obligations on Legislative Leaders beyond those imposed by the Federal Rules of Civil Procedure.

2. Legislative Leaders object to the definitions and instructions accompanying this discovery to the extent such definitions and instructions purport to require the production of any material or information subject to attorney-client privilege, attorney work-product privilege, legislative (speech or debate) privilege, deliberative process privilege, or any other applicable privilege.

3. Legislative Leaders object to producing any information not relevant to this litigation.

4. Legislative Leaders object to producing any document already in the possession, custody or control of Plaintiffs or their agents.

5. Legislative Leaders object to producing any document that is publicly available.

6. Legislative Leaders object to the requests to the extent that that they are duplicative (identical requests were directed to each individual defendant and each intervenor), overly broad, unduly burdensome and seek information which is not reasonably calculated to lead to the discovery of admissible evidence.

7. Legislative Leaders object to the requests because the requests seek documents from them that are protected from production in federal civil actions by the legislative privilege. Any documents in the possession, custody or control of the Legislative Leaders that might be responsive to the requests are documents used by the Legislative Leaders in the conduct of their core legislative duties, including the enactment of legislation related to education and education funding.

8. Legislative Leaders object to the requests to the extent that they seek documents protected in federal civil actions by the deliberative process privilege.

9. Legislative Leaders object to Request Instruction #2, which seeks the production of a privilege log. As noted in General Objection #7, any documents in the possession, custody or control of the Legislative Leaders that might be responsive to the requests are

documents used by the Legislative Leaders in the conduct of core legislative functions. The legislative privilege protects Legislative Leaders against the interference with their duties in connection with and the disruption of the legislative process, which the location and identification of the requested documents would engender.

RESERVATIONS

The following responses are provided without waiving the above general objections or any specific objections hereinafter set forth. Further, the following responses are made without waiving:

1. Objections to the use of the responses on the grounds of competency, relevancy, materiality, privilege or inadmissibility, or for any other reason in any hearing or trial in this or any other matter; and

2. Objections to any demand for further responses with respect to the information provided herein.

3. Discovery is continuing and additional responsive and relevant (non-privileged) documents may be identified over time. If and when such documents are identified, proper notice will be given and the documents will be produced.

RESPONSES

1. All minutes, agendas, notes, or other records of formal or informal meetings concerning, in whole or in part, funding for public education in Pennsylvania.

Response:

Legislative Leaders incorporate herein the General Objections as set forth above. Legislative Leaders specifically object to this Request because any documents in the possession, custody or control of the Legislative Leaders that might be responsive to the requests are documents used by the Legislative Leaders in the conduct of core legislative functions and are protected by the legislative privilege and, additionally, may be protected by the deliberative process privilege. Legislative Leaders further object to this Request because it is overly broad and unduly burdensome in its failure to identify with specificity the documents requested, since a great many documents may "concern," in whole or in part, funding for public education in Pennsylvania, and in its failure to specify a time frame from within which documents are sought.

2. For each school year from 1991-92 through 1999-2000, all rules, regulations, operating procedures, guidelines, guidances (including but not limited to Basic Education Circulars) concerning any and all aspects of funding for public education in Pennsylvania.

Response:

Legislative Leaders incorporate herein the General Objections as set forth above. Legislative Leaders specifically object to this Request because any documents in the possession, custody or control of the Legislative Leaders that might be responsive to the requests are documents used by the Legislative Leaders in the conduct of core legislative functions and are protected by the legislative privilege and, additionally, may be protected by the deliberative process privilege. Legislative Leaders further object to this Request because it seeks the

production of statutes and regulations and of other documents that are publicly available and because the Request is overly broad and unduly burdensome in that the specified time frame includes years not relevant to the claims in this litigation.

3. All documents sufficient to explain appropriations, expenditures, allocations, and funding formulas for public education in Pennsylvania.

Response:

Legislative Leaders incorporate herein the General Objections as set forth above. Legislative Leaders specifically object to this Request because any documents in the possession, custody or control of the Legislative Leaders that might be responsive to the requests are documents used by the Legislative Leaders in the conduct of core legislative functions and are protected by the legislative privilege and, additionally, may be protected by the deliberative process privilege. Legislative Leaders further object to this Request because it seeks production of statutes and regulations and of other information that is publicly available and because the Request is overly broad and unduly burdensome in its failure to specify a particular time frame from within which responsive documents are sought.

4. All documents concerning recommendations for, forecasting the future of, or evaluations of funding for public education in Pennsylvania.

Response:

Legislative Leaders incorporate herein the General Objections as set forth above. Legislative Leaders

specifically object to this Request because any documents in the possession, custody or control of the Legislative Leaders that might be responsive to the requests are documents used by the Legislative Leaders in the conduct of core legislative functions and are protected by the legislative privilege and, additionally, may be protected by the deliberative process privilege. Legislative Leaders further object to this Request to the extent that it seeks the production of documents that are publicly available and because the Request is overly broad and unduly burdensome in its failure to specify a particular time frame from within which responsive documents are sought.

5. All documents that evidence, summarize, or refer to comparisons among public schools or public school districts in Pennsylvania, relating to funding for public education, the factors that determine levels of funding for public education, and student performance.

Response:

Legislative Leaders incorporate herein the General Objections as set forth above. Legislative Leaders specifically object to this Request because any documents in the possession, custody or control of the Legislative Leaders that might be responsive to the requests are documents used by the Legislative Leaders in the conduct of core legislative functions and are protected by the legislative privilege and, additionally, may be protected by the deliberative process privilege. Legislative Leaders further object to this Request on the ground that it seeks production of documents that are publicly available and because the Request is overly broad and unduly burdensome in its failure to specify a particular time frame from within which responsive documents are sought.

6. All documents sponsored, commissioned, or published by the Governor, the Pennsylvania Department of Education and/or any other official or agency of the Commonwealth of Pennsylvania, including any committee of the General Assembly, analyzing features or effects of Pennsylvania's public school funding system.

Response:

Legislative Leaders incorporate herein the General Objections as set forth above. Legislative Leaders specifically object to this Request because any documents in the possession, custody or control of the Legislative Leaders that might be responsive to the requests are documents used by the Legislative Leaders in the conduct of core legislative functions and are protected by the legislative privilege and, additionally, may be protected by the deliberative process privilege. Legislative Leaders further object to this Request to the extent that documents "sponsored, commissioned, or published by the Governor, the Pennsylvania Department of Education, and/or any other official or agency of the Commonwealth" are likely to be publicly available, and because the Request is overly broad and unduly burdensome in its failure to specify a particular time frame from within which responsive documents are sought.

7. For each year from 1991-91 through 1999-2000, all final documents sufficient to show Commonwealth appropriations for public education in Pennsylvania. If final documents do not exist for any school year, then produce all interim reports for such school year. Documents should be produced in hard copy and in electronic form.

Response:

Legislative Leaders incorporate herein the General Objections as set forth above. Legislative Leaders specifically object to this Request because any documents in the possession, custody or control of the Legislative Leaders that might be responsive to the requests are documents used by the Legislative Leaders in the conduct of core legislative functions and are protected by the legislative privilege and, additionally, may be protected by the deliberative process privilege. Legislative Leaders further object to this Request because it seeks the production of appropriation acts, which are publicly available, and because the Request is overly broad and unduly burdensome in that the specified time frame includes years not relevant to the claims in this litigation.

8. For each school year from 1991-92 through 1999-2000, all documents containing budget or appropriations requests and recommendations (including any narrative supporting material) concerning funding for public education made by or on behalf of the Pennsylvania Board of Education or the Pennsylvania Department of Education to the Governor or the Office of the Budget, and vice versa.

Response:

Legislative Leaders incorporate herein the General Objections as set forth above. Legislative Leaders specifically object to this Request because any documents in the possession, custody or control of the Legislative Leaders that might be responsive to the requests are documents used by the Legislative Leaders in the conduct of core legislative functions and are protected by the legislative privilege and, additionally, may be protected by

the deliberative process privilege. Legislative Leaders further object to this Request because it seeks the production of documents not in the possession, custody or control of Legislative Leaders and because the Request is overly broad and unduly burdensome in that the specified time frame includes years not relevant to the claims in this litigation.

9. For each school year from 1991-92 through 1999-2000, all documents, including but not limited to memoranda, correspondence, proposals, alternative proposals, models, reports or updates submitted by or on behalf of any Defendant to (a) any other Defendant or (b) any member, officer, committee, group, legislator, or other person or entity in the Pennsylvania General Assembly, concerning funding for public education in Pennsylvania or appropriations for any school district.

Response:

Legislative Leaders incorporate herein their General Objections as set forth above. Legislative Leaders specifically object to this Request because any documents in the possession, custody or control of the Legislative Leaders that might be responsive to the requests are documents used by the Legislative Leaders in the conduct of core legislative functions and are protected by the legislative privilege and, additionally, may be protected by the deliberative process privilege. Legislative Leaders further object to this Request because it is overly broad and unduly burdensome in that the specified time frame includes years not relevant to the claims in this litigation.

10. For each school year from 1991-92 through 1999-2000, all documents, including but not limited to memoranda, correspondence, proposals, alternative

proposals, models, reports or updates submitted by or on behalf of any Defendant to (a) any other Defendant or (b) any member, officer, committee, group, legislator, or other person or entity in the Pennsylvania General Assembly, concerning (i) the basis and factors for the Basic Education Funding formula; (ii) any proposed or actual changes in the Basic Education Funding formula; (iii) the reason(s) for any changes to the Basic Education Funding formula; (iv) the effect(s) of any changes to the Basic Funding formula.

Response:

Legislative Leaders incorporate herein their General Objections as set forth above. Legislative Leaders specifically object to this Request because any documents in the possession, custody or control of the Legislative Leaders that might be responsive to the requests are documents used by the Legislative Leaders in the conduct of core legislative functions and are protected by the legislative privilege and, additionally, may be protected by the deliberative process privilege. Legislative Leaders further object to this Request because it is overly broad and unduly burdensome in that the specified time frame includes years not relevant to the claims in this litigation.

11. For each school year from 1991-92 through 1999-2000, all documents, including but not limited to memoranda, correspondence, proposals, alternative proposals, models, reports or updates submitted by or on behalf of any Defendant to (a) any other Defendant or (b) any member, officer, committee, group, legislator, or other person or entity in the Pennsylvania General Assembly, concerning (i) the basis and factors for any and all formula(s) and criteria used to determine the allocation of each category of Categorical Funding to school districts; (ii) any proposed or actual changes in any and all

formula(s) and criteria for each category of Categorical Funding; (iii) the reason(s) for any changes to any and all formula(s) and criteria for each category of Categorical Funding; (iv) the effect(s) of any changes to the formula(s) and criteria for each category of Categorical Funding.

Response:

Legislative Leaders incorporate herein their General Objections as set forth above. Legislative Leaders specifically object to this Request because any documents in the possession, custody or control of the Legislative Leaders that might be responsive to the requests are documents used by the Legislative Leaders in the conduct of core legislative functions and are protected by the legislative privilege and, additionally, may be protected by the deliberative process privilege. Legislative Leaders further object to this Request because it is overly broad and unduly burdensome in that the specified time frame includes years not relevant to the claims in this litigation and in that it seeks the production of statutes and regulations, which are publicly available.

12. For each school year from 1991-92 through 1999-2000, all documents, including but not limited to memoranda, correspondence, proposals, alternative proposals, models, reports or updates submitted by or on behalf of any Defendant to (a) any other Defendant or (b) any member, officer, committee, group, legislator, or other person or entity in the Pennsylvania General Assembly, concerning (i) the basis and factors for any and all formula(s) and criteria used to determine the allocation of Other Subsidies to school districts; (ii) any proposed or actual changes in any and all formula(s) and criteria for Other Subsidies; (iii) the reason(s) for any changes to the formula(s) and criteria for Other Subsidies; (iv) the

effect(s) of any changes to the formula(s) and criteria for Other Subsidies.

Response:

Legislative Leaders incorporate herein their General Objections as set forth above. Legislative Leaders specifically object to this Request because any documents in the possession, custody or control of the Legislative Leaders that might be responsive to the requests are documents used by the Legislative Leaders in the conduct of core legislative functions and are protected by the legislative privilege and, additionally, may be protected by the deliberative process privilege. Legislative Leaders further object to this Request because it is overly broad and unduly burdensome in that the specified time frame includes years not relevant to the claims in this litigation and in that it seeks the production of documents which are publicly available.

13. For each school year from 1991-92 through 1999-2000, all final documents sufficient to show total expenditures and revenues for public education for each school district in Pennsylvania. If final documents do not exist for any school year, then produce all interim reports for such school year. Documents should be produced in hard copy and in electronic form.

Response:

Legislative Leaders incorporate herein their General Objections as set forth above. Legislative Leaders specifically object to this Request because any documents in the possession, custody or control of the Legislative Leaders that might be responsive to the requests are documents used by the Legislative Leaders in the conduct

of core legislative functions and are protected by the legislative privilege and, additionally, may be protected by the deliberative process privilege. Legislative Leaders further object to this Request because it is overly broad and unduly burdensome in that the specified time frame includes years not relevant to the claims in this litigation and in that it seeks the production of documents which are publicly available.

14. For each school year from 1991-92 through 1999-2000, all final documents sufficient to show total expenditures and revenues per pupil for each school district in Pennsylvania. If final documents do not exist for any school year, then produce all interim reports for such school year. Documents should be produced in hard copy and in electronic form.

Response:

Legislative Leaders incorporate herein their General Objections as set forth above. Legislative Leaders specifically object to this Request because any documents in the possession, custody or control of the Legislative Leaders that might be responsive to the requests are documents used by the Legislative Leaders in the conduct of core legislative functions and are protected by the legislative privilege and, additionally, may be protected by the deliberative process privilege. Legislative Leaders further object to this Request because it is overly broad and unduly burdensome in that the specified time frame includes years not relevant to the claims in this litigation and in that it seeks the production of documents which are publicly available.

15. For each school year from 1991-92 through 1999-2000, all final documents sufficient to show total

Commonwealth treasury funding for each school district in Pennsylvania. If final documents do not exist for any school year, then produce all interim reports for such school year. Documents should be produced in hard copy and in electronic form.

Response:

Legislative Leaders incorporate herein their General Objections as set forth above. Legislative Leaders specifically object to this Request because any documents in the possession, custody or control of the Legislative Leaders that might be responsive to the requests are documents used by the Legislative Leaders in the conduct of core legislative functions and are protected by the legislative privilege and, additionally, may be protected by the deliberative process privilege. Legislative Leaders further object to this Request because it is overly broad and unduly burdensome in that the specified time frame includes years not relevant to the claims in this litigation and in that it seeks the production of documents which are publicly available.

16. For each school year from 1991-92 through 1999-2000, all final documents sufficient to show total Commonwealth treasury funding per pupil for each school district in Pennsylvania. If final documents do not exist for any school year, then produce all interim reports for such school year. Documents should be produced in hard copy and in electronic form.

Response:

Legislative Leaders incorporate herein their General Objections as set forth above. Legislative Leaders specifically object to this Request because any documents

in the possession, custody or control of the Legislative Leaders that might be responsive to the requests are documents used by the Legislative Leaders in the conduct of core legislative functions and are protected by the legislative privilege and, additionally, may be protected by the deliberative process privilege. Legislative Leaders further object to this Request because it is overly broad and unduly burdensome in that the specified time frame includes years not relevant to the claims in this litigation and in that it seeks the production of documents which are publicly available.

17. For each school year from 1991-92 through 1999-2000, all final documents sufficient to show Basic Education Funding for each school district in Pennsylvania. If final documents do not exist for any school year, then produce all interim reports for such school year. Documents should be produced in hard copy and in electronic form.

Response:

Legislative Leaders incorporate herein their General Objections as set forth above. Legislative Leaders specifically object to this Request because any documents in the possession, custody or control of the Legislative Leaders that might be responsive to the requests are documents used by the Legislative Leaders in the conduct of core legislative functions and are protected by the legislative privilege and, additionally, may be protected by the deliberative process privilege. Legislative Leaders further object to this Request because it is overly broad and unduly burdensome in that the specified time frame includes years not relevant to the claims in this litigation and in that it seeks the production of documents which are publicly available.

18. For each school year from 1991-92 through 1999-2000, all final documents sufficient to show, per pupil, Basic Education Funding for each school district in Pennsylvania. If final documents do not exist for any school year, then produce all interim reports for such school year. Documents should be produced in hard and electronic form.

Response:

Legislative Leaders incorporate herein their General Objections as set forth above. Legislative Leaders specifically object to this Request because any documents in the possession, custody or control of the Legislative Leaders that might be responsive to the requests are documents used by the Legislative Leaders in the conduct of core legislative functions and are protected by the legislative privilege and, additionally, may be protected by the deliberative process privilege. Legislative Leaders further object to this Request because it is overly broad and unduly burdensome in that the specified time frame includes years not relevant to the claims in this litigation and in that it seeks the production of documents which are publicly available.

19. For each school year from 1991-92 through 1999-2000, all documents sufficient to show, for each school district, the percentage of total Commonwealth treasury revenues that Basic Education Funding comprises.

Response:

Legislative Leaders incorporate herein their General Objections as set forth above. Legislative Leaders specifically object to this Request because any documents

in the possession, custody or control of the Legislative Leaders that might be responsive to the requests are documents used by the Legislative Leaders in the conduct of core legislative functions and are protected by the legislative privilege and, additionally, may be protected by the deliberative process privilege. Legislative Leaders further object to this Request because it is overly broad and unduly burdensome in that the specified time frame includes years not relevant to the claims in this litigation and in that it seeks the production of documents which are publicly available.

20. For each school year from 1991-92 through 1999-2000, all final documents sufficient to show the amount of each category of Categorical Funding for each school district in Pennsylvania. If final documents do not exist for any school year, then produce all interim reports for such school year. Documents should be produced in hard copy and in electronic form.

Response:

Legislative Leaders incorporate herein their General Objections as set forth above. Legislative Leaders specifically object to this Request because any documents in the possession, custody or control of the Legislative Leaders that might be responsive to the requests are documents used by the Legislative Leaders in the conduct of core legislative functions and are protected by the legislative privilege and, additionally, may be protected by the deliberative process privilege. Legislative Leaders further object to this Request because it is overly broad and unduly burdensome in that the specified time frame includes years not relevant to the claims in this litigation and in that it seeks the production of documents which are publicly available.

21. For each school year from 1991-92 through 1999-2000, all final documents sufficient to show, per pupil, the amount of each category of Categorical Funding for each school district in Pennsylvania. If final documents do not exist for any school year, then produce all interim reports for such school year. Documents should be produced in hard copy and in electronic form.

Response:

Legislative Leaders incorporate herein their General Objections as set forth above. Legislative Leaders specifically object to this Request because any documents in the possession, custody or control of the Legislative Leaders that might be responsive to the requests are documents used by the Legislative Leaders in the conduct of core legislative functions and are protected by the legislative privilege and, additionally, may be protected by the deliberative process privilege. Legislative Leaders further object to this Request because it is overly broad and unduly burdensome in that the specified time frame includes years not relevant to the claims in this litigation and in that it seeks the production of documents which are publicly available.

22. For each school year from 1991-92 through 1999-2000, all documents sufficient to show, for each school district, the percentage of total Commonwealth treasury revenues that Categorical Funding comprises.

Response:

Legislative Leaders incorporate herein their General Objections as set forth above. Legislative Leaders specifically object to this Request because any documents

in the possession, custody or control of the Legislative Leaders that might be responsive to the requests are documents used by the Legislative Leaders in the conduct of core legislative functions and are protected by the legislative privilege and, additionally, may be protected by the deliberative process privilege. Legislative Leaders further object to this Request because it is overly broad and unduly burdensome in that the specified time frame includes years not relevant to the claims in this litigation and in that it seeks the production of documents which are publicly available.

23. For each school year from 1991-92 through 1999-2000, all final documents sufficient to show Commonwealth treasury funding for Other Subsidies for each school district in Pennsylvania. If final documents do not exist for any school year, then produce all interim reports for such school year. Documents should be produced in hard copy and in electronic form.

Response:

Legislative Leaders incorporate herein their General Objections as set forth above. Legislative Leaders specifically object to this Request because any documents in the possession, custody or control of the Legislative Leaders that might be responsive to the requests are documents used by the Legislative Leaders in the conduct of core legislative functions and are protected by the legislative privilege and, additionally, may be protected by the deliberative process privilege. Legislative Leaders further object to this Request because it is overly broad and unduly burdensome in that the specified time frame includes years not relevant to the claims in this litigation and in that it seeks the production of documents which are publicly available.

24. For each school year from 1991-92 through 1999-2000, all final documents sufficient to show, per pupil, Commonwealth treasury funding for Other Subsidies for each school district in Pennsylvania. If final documents do not exist for any school year, then produce all interim reports for such school year. Documents should be produced in hard copy and in electronic form.

Response:

Legislative Leaders incorporate herein their General Objections as set forth above. Legislative Leaders specifically object to this Request because any documents in the possession, custody or control of the Legislative Leaders that might be responsive to the requests are documents used by the Legislative Leaders in the conduct of core legislative functions and are protected by the legislative privilege and, additionally, may be protected by the deliberative process privilege. Legislative Leaders further object to this Request because it is overly broad and unduly burdensome in that the specified time frame includes years not relevant to the claims in this litigation and in that it seeks the production of documents which are publicly available.

25. For each school year from 1991-92 through 1999-2000, all final documents sufficient to show, for each school district, the percentage of total Commonwealth treasury revenues that Other Subsidies comprise.

Response:

Legislative Leaders incorporate herein their General Objections as set forth above. Legislative Leaders specifically object to this Request because any documents in the possession, custody or control of the Legislative

Leaders that might be responsive to the requests are documents used by the Legislative Leaders in the conduct of core legislative functions and are protected by the legislative privilege and, additionally, may be protected by the deliberative process privilege. Legislative Leaders further object to this Request because it is overly broad and unduly burdensome in that the specified time frame includes years not relevant to the claims in this litigation and in that it seeks the production of documents which are publicly available.

26. For each school year from 1991-92 through 1999-2000, all final documents sufficient to show all Basic Education Funding supplements (including but not limited to base supplement, growth supplement, poverty supplement, minimal increase supplement, small district assistance supplement) for each school district. If final documents do not exist for any school year, then produce all interim reports for such school year. Documents should be produced in hard copy and in electronic form.

Response:

Legislative Leaders incorporate herein their General Objections as set forth above. Legislative Leaders specifically object to this Request because any documents in the possession, custody or control of the Legislative Leaders that might be responsive to the requests are documents used by the Legislative Leaders in the conduct of core legislative functions and are protected by the legislative privilege and, additionally, may be protected by the deliberative process privilege. Legislative Leaders further object to this Request because it is overly broad and unduly burdensome in that the specified time frame includes years not relevant to the claims in this litigation

and in that it seeks the production of documents which are publicly available.

27. For each school year from 1991-92 through 1999-2000, all final documents sufficient to show total federal funding for public education in Pennsylvania. If final documents do not exist for any school year, then produce all interim reports for such school year. Documents should be produced in hard copy and in electronic form.

Response:

Legislative Leaders incorporate herein their General Objections as set forth above. Legislative Leaders specifically object to this Request because any documents in the possession, custody or control of the Legislative Leaders that might be responsive to the requests are documents used by the Legislative Leaders in the conduct of core legislative functions and are protected by the legislative privilege and, additionally, may be protected by the deliberative process privilege. Legislative Leaders further object to this Request because it is overly broad and unduly burdensome in that the specified time frame includes years not relevant to the claims in this litigation and in that it seeks the production of documents which are publicly available. Legislative Leaders further object to this Request because it seeks information in the possession, custody or control of others, since individual school districts, such as the School District of Philadelphia and all the other 500 school districts not party to this litigation, have the ability to apply for and obtain federal funds that do not pass through the Commonwealth's treasury.

28. For each school year from 1991-92 through 1999-2000, all final documents sufficient to show total

federal funding appropriated by the Commonwealth for each school district in Pennsylvania. If final documents do not exist for any school year, then produce all interim reports for such school year. Documents should be produced in hard copy and in electronic form.

Response:

Legislative Leaders incorporate herein their General Objections as set forth above. Legislative Leaders specifically object to this Request because any documents in the possession, custody or control of the Legislative Leaders that might be responsive to the requests are documents used by the Legislative Leaders in the conduct of core legislative functions and are protected by the legislative privilege and, additionally, may be protected by the deliberative process privilege. Legislative Leaders further object to this Request because it is overly broad and unduly burdensome in that the specified time frame includes years not relevant to the claims in this litigation and in that it seeks the production of documents which are publicly available.

29. For each school year from 1991-92 through 1999-2000, all final documents sufficient to show total federal funding for each school district whether or not appropriated by the Commonwealth. If final documents do not exist for any school year, then produce all interim reports for such school year. Documents should be produced in hard copy and in electronic form.

Response:

Legislative Leaders incorporate herein their General Objections as set forth above. Legislative Leaders specifically object to this Request because any documents

in the possession, custody or control of the Legislative Leaders that might be responsive to the requests are documents used by the Legislative Leaders in the conduct of core legislative functions and are protected by the legislative privilege and, additionally, may be protected by the deliberative process privilege. Legislative Leaders further object to this Request because it is overly broad and unduly burdensome in that the specified time frame includes years not relevant to the claims in this litigation and in that it seeks the production of documents which are publicly available. Legislative Leaders further object to this Request because it seeks information in the possession, custody or control of others, since individual school districts, such as the School District of Philadelphia and all the other 500 school districts not party to this litigation, have the ability to apply for and obtain federal funds that do not pass through the Commonwealth's treasury.

30. For each school year from 1991-92 through 1999-2000, all final documents sufficient to show total federal funding per pupil appropriated by the Commonwealth for each school district in Pennsylvania. If final documents do not exist for any school year, then produce all interim reports for such school year. Documents should be produced in hard copy and in electronic form.

Response:

Legislative Leaders incorporate herein their General Objections as set forth above. Legislative Leaders specifically object to this Request because any documents in the possession, custody or control of the Legislative Leaders that might be responsive to the requests are documents used by the Legislative Leaders in the conduct of core legislative functions and are protected by the

legislative privilege and, additionally, may be protected by the deliberative process privilege. Legislative Leaders further object to this Request because it is overly broad and unduly burdensome in that the specified time frame includes years not relevant to the claims in this litigation and in that it seeks the production of documents which are publicly available.

31. For each school year from 1991-92 through 1999-2000, all final documents sufficient to show, for each school district in Pennsylvania, federal funding under:

(a) the Elementary and Secondary Education Act of 1965 ("ESEA"), as amended by the Improving America's Schools Act of 1994, known as Chapter I or Title I;

(b) ESEA, Title II;

(c) ESEA, Title III, for technology, such as the "Technology Literacy Challenge Fund";

(d) ESEA, Title IV, titled "Safe & Drug-Free Schools";

(e) ESEA, Chapter II or Title VI, titled "Innovative Education Program Strategies, "for Commonwealth-administered block grants;

(f) Department of Education Appropriations Act of 1999, Section 307, Class Size Reduction;

(g) ESEA, Title X, Public Charter Schools;

(h) Individuals with Disabilities Education Act ("IDEA");

(i) Perkins Vocational & Technical Education Act;

(j) Goals 2000: Educate America Act, Title III;

(k) Dwight D. Eisenhower Professional Development Program; and

(l) grants for bilingual education

If final documents do not exist for any school year, then produce all interim reports for such school year. Documents should be produced in hard copy and in electronic form.

Response:

Legislative Leaders incorporate herein their General Objections as set forth above. Legislative Leaders specifically object to this Request because any documents in the possession, custody or control of the Legislative Leaders that might be responsive to the requests are documents used by the Legislative Leaders in the conduct of core legislative functions and are protected by the legislative privilege and, additionally, may be protected by the deliberative process privilege. Legislative Leaders further object to this Request because it is overly broad and unduly burdensome in that the specified time frame includes years not relevant to the claims in this litigation and in that it seeks the production of documents which are publicly available.

32. For each school year from 1991-92 through 1999-2000, all final documents sufficient to show, for each school district in Pennsylvania, all forms of federal funding not included in paragraph 31, above. If final documents do

not exist for any school year, then produce all interim reports for such school year. Documents should be produced in hard copy and in electronic form.

Response:

Legislative Leaders incorporate herein their General Objections as set forth above. Legislative Leaders specifically object to this Request because any documents in the possession, custody or control of the Legislative Leaders that might be responsive to the requests are documents used by the Legislative Leaders in the conduct of core legislative functions and are protected by the legislative privilege and, additionally, may be protected by the deliberative process privilege. Legislative Leaders further object to this Request because it is overly broad and unduly burdensome in that the specified time frame includes years not relevant to the claims in this litigation and in that it seeks the production of documents which are publicly available. Legislative Leaders further object to this Request because it seeks information in the possession, custody or control of others, since individual school districts, such as the School District of Philadelphia and all the other 500 school districts not party to this litigation, have the ability to apply for and obtain federal funds that do not pass through the Commonwealth's treasury.

33. All documents submitted by or on behalf of any Defendant or any department or agency any Defendant represents to the United States Department of Education or any other federal agency concerning any request for federal funds for public education, including but not limited to:

(a) applications, written requests for assistance, approvals;

(b) performance reports, annual reports, annual program reports, long-range program reports, financial reports, financial expenditure information, supplementary submissions;

(c) certifications and assurances;

(d) state plans, amendments, and related official materials, including but not limited to budgets;

(e) subgrant applications and approvals; and

(f) correspondence.

Response:

Legislative Leaders incorporate herein their General Objections as set forth above. Legislative Leaders specifically object to this Request because any documents in the possession, custody or control of the Legislative Leaders that might be responsive to the requests are documents used by the Legislative Leaders in the conduct of core legislative functions and are protected by the legislative privilege and, additionally, may be protected by the deliberative process privilege. Legislative Leaders further object to this Request because it is overly broad and unduly burdensome in that it seeks the production of documents which are publicly available and which are in the possession, custody or control of others and in that it fails to specify a time frame from within which responsive documents are sought.

34. All notifications of grant awards from the United States Department of Education.

Response:

Legislative Leaders incorporate herein their General Objections as set forth above. Legislative Leaders specifically object to this Request because any documents in the possession, custody or control of the Legislative Leaders that might be responsive to the requests are documents used by the Legislative Leaders in the conduct of core legislative functions and are protected by the legislative privilege and, additionally, may be protected by the deliberative process privilege. Legislative Leaders further object to this Request because it is overly broad and unduly burdensome in that it seeks the production of documents which are publicly available and which are in the possession, custody or control of others and in that it fails to specify a time frame from within which responsive documents are sought.

35. For each school year from 1991-92 through 1999-2000, all final documents sufficient to show total local revenue for public education for each school district in Pennsylvania. If final documents do not exist for any school year, then produce all interim reports for such school year. Documents should be produced in hard copy and in electronic form.

Response:

Legislative Leaders incorporate herein their General Objections as set forth above. Legislative Leaders specifically object to this Request because any documents in the possession, custody, or control of the Legislative Leaders that might be responsive to the requests are documents used by the Legislative Leaders in the conduct of core legislative functions and are protected by the legislative privilege and, additionally, may be protected by

the deliberative process privilege. Legislative Leaders further object to this Request because it is overly broad and unduly burdensome in that it seeks the production of documents which are publicly available and which are in the possession, custody or control of others and in that the specified time frame includes years not relevant to the claims in this litigation.

36. For each school year from 1991-92 through 1999-2000, all final documents sufficient to show total local revenues per pupil for each school district in Pennsylvania. If final documents do not exist for any school year, then produce all interim reports for such school year. Documents should be produced in hard copy and in electronic form.

Response:

Legislative Leaders incorporate herein their General Objections as set forth above. Legislative Leaders specifically object to this Request because any documents in the possession, custody or control of the Legislative Leaders that might be responsive to the requests are documents used by the Legislative Leaders in the conduct of core legislative functions and are protected by the legislative privilege and, additionally, may be protected by the deliberative process privilege. Legislative Leaders further object to this Request because it is overly broad and unduly burdensome in that the specified time frame includes years not relevant to the claims in this litigation and in that it seeks the production of documents which are publicly available.

37. Documents sufficient to show all components of local revenues for each school district and the revenue for each component.

Response:

Legislative Leaders incorporate herein their General Objections as set forth above. Legislative Leaders specifically object to this Request because any documents in the possession, custody or control of the Legislative Leaders that might be responsive to the requests are documents used by the Legislative Leaders in the conduct of core legislative functions and are protected by the legislative privilege and, additionally, may be protected by the deliberative process privilege. Legislative Leaders further object to this Request because it is overly broad and unduly burdensome in that it seeks the production of documents which are publicly available, in that it fails to specify a time frame from within which responsive documents are sought, in that it seeks information not relevant to this litigation, and in that its seeks information in the custody, control or possession of others, including the School District of Philadelphia and the 500 individual school districts not party to this litigation.

38. For each school year from 1991-92 through 1999-2000, documents sufficient to identify the categories of documents containing financial statements that are submitted by any school district(s) to any of the Defendants.

Response:

Legislative Leaders incorporate herein their General Objections as set forth above. Legislative Leaders specifically object to this Request because any documents in the possession, custody or control of the Legislative Leaders that might be responsive to the requests are documents used by the Legislative Leaders in the conduct of core legislative functions and are protected by the

legislative privilege and, additionally, may be protected by the deliberative process privilege. Legislative Leaders further object to this Request because it is overly broad and unduly burdensome in that the specified time frame includes years not relevant to the claims in this litigation, in that it seeks the production of documents which are publicly available and within the custody, control or possession of others.

39. For each school year from 1991-92 through 1999-2000, all documents prepared by any agency or officer of the Commonwealth sufficient to show all analyses, comparisons, or compilations of information provided to the Commonwealth by any school district(s) concerning funding for public education.

Response:

Legislative Leaders incorporate herein their General Objections as set forth above. Legislative Leaders specifically object to this Request because any documents in the possession, custody or control of the Legislative Leaders that might be responsive to the requests are documents used by the Legislative Leaders in the conduct of core legislative functions and are protected by the legislative privilege and, additionally, may be protected by the deliberative process privilege. Legislative Leaders further object to this Request because it is overly broad and unduly burdensome in that the specified time frame includes years not relevant to the claims in this litigation and in that the information sought is publicly available and in the custody, control and possession of others.

40. For each school year from 1991-92 through 1999-2000, all final documents sufficient to show, for each school district in Pennsylvania:

(a) the Average Daily Membership;

(b) the Weighted Average Daily Membership;
(c) the Market Value of Real Property;

(d) the Personal Income Valuation; and

(e) the Market Value/Personal Income Aid Ratio (both with and without applying the .150 minimum).

If final documents do not exist for any school year, then produce all interim reports for such school year. Documents should be produced in hard copy and in electronic form.

Response:

Legislative Leaders incorporate herein their General Objections as set forth above. Legislative Leaders specifically object to this Request because any documents in the possession, custody or control of the Legislative Leaders that might be responsive to the requests are documents used by the Legislative Leaders in the conduct of core legislative functions and are protected by the legislative privilege and, additionally, may be protected by the deliberative process privilege. Legislative Leaders further object to this Request because it is overly broad and unduly burdensome in that the specified time frame includes years not relevant to the claims in this litigation and in that it seeks the production of documents which are publicly available.

41. For each school year from 1991-92 through 1999-2000, documents sufficient to show the final, official

classes of all school districts in Pennsylvania (including but not limited to first, first class-A, second, third, fourth).

Response:

Legislative Leaders incorporate herein their General Objections as set forth above. Legislative Leaders specifically object to this Request because any documents in the possession, custody or control of the Legislative Leaders that might be responsive to the requests are documents used by the Legislative Leaders in the conduct of core legislative functions and are protected by the legislative privilege and, additionally, may be protected by the deliberative process privilege. Legislative Leaders further object to this Request because it is overly broad and unduly burdensome in that the specified time frame includes years not relevant to the claims in this litigation and in that it seeks the production of documents which are publicly available and in the custody, control and possession of others.

42. For each school year from 1991-92 through 1999-2000, all final documents sufficient to show the number and percentage of the following enrolled in grades K-12 in Pennsylvania public schools as a whole and in each school district (including Philadelphia):

(a) White/Caucasian Students;

(b) African-American Students;

(c) Hispanic/Latino Students;

(d) Native American Students;

(e) Asian-American Students; and

(f) Any other racial or ethnic group for which records are maintained.

If final documents do not exist for any school year, then produce all interim reports for such school year. Documents should be produced in hard copy and in electronic form.

Response:

Legislative Leaders incorporate herein their General Objections as set forth above. Legislative Leaders specifically object to this Request because any documents in the possession, custody or control of the Legislative Leaders that might be responsive to the requests are documents used by the Legislative Leaders in the conduct of core legislative functions and are protected by the legislative privilege and, additionally, may be protected by the deliberative process privilege. Legislative Leaders further object to this Request because it is overly broad and unduly burdensome in that the specified time frame includes years not relevant to the claims in this litigation and in that it seeks the production of documents which are publicly available.

43. All documents that evidence, summarize, or refer to comparisons among public schools or public school districts in Pennsylvania, relating to the racial or ethnic composition of school districts.

Response:

Legislative Leaders incorporate herein their General Objections as set forth above. Legislative Leaders specifically object to this Request because any documents

in the possession, custody or control of the Legislative Leaders that might be responsive to the requests are documents used by the Legislative Leaders in the conduct of core legislative functions and are protected by the legislative privilege and, additionally, may be protected by the deliberative process privilege. Legislative Leaders further object to this Request because it is overly broad and unduly burdensome in that it seeks the production of documents which are publicly available and in that it fails to specify a time frame from within which responsive documents are sought.

44. For each school year from 1991-92 through 1999-2000, all final documents sufficient to show the number and percentage of children in families eligible to receive Aid to Families with Dependent Children ("AFDC") or Temporary Assistance for Needy Families ("TANF") enrolled in Pennsylvania public schools as a whole and in each school district (including Philadelphia). If final documents do not exist for any school year, then produce all interim reports for such school year. Documents should be produced in hard copy and in electronic form.

Response:

Legislative Leaders incorporate herein their General Objections as set forth above. Legislative Leaders specifically object to this Request because any documents in the possession, custody or control of the Legislative Leaders that might be responsive to the requests are documents used by the Legislative Leaders in the conduct of core legislative functions and are protected by the legislative privilege and, additionally, may be protected by the deliberative process privilege. Legislative Leaders further object to this Request because it is overly broad and

unduly burdensome in that the specified time frame includes years not relevant to the claims in this litigation and in that it seeks the production of documents which are publicly available.

45. For each school year from 1991-92 through 1999-2000, all final documents sufficient to show the number and percentage of children eligible to receive free and reduced cost lunch in Pennsylvania public schools as a whole and in each school district (including Philadelphia). If final documents do not exist for any school year, then produce all interim reports for such school year. Documents should be produced in hard copy and in electronic form.

Response:

Legislative Leaders incorporate herein their General Objections as set forth above. Legislative Leaders specifically object to this Request because any documents in the possession, custody or control of the Legislative Leaders that might be responsive to the requests are documents used by the Legislative Leaders in the conduct of core legislative functions and are protected by the legislative privilege and, additionally, may be protected by the deliberative process privilege. Legislative Leaders further object to this Request because it is overly broad and unduly burdensome in that the specified time frame includes years not relevant to the claims in this litigation and in that it seeks the production of documents which are publicly available.

46. For each school year from 1991-92 through 1999-2000, all final documents sufficient to show the number and percentage of children in families at or below any other indicator of poverty enrolled in Pennsylvania

public schools as a whole and in each school district (including Philadelphia). If final documents do not exist for any school year, then produce all interim reports for such school year. Documents should be produced in hard copy and in electronic form.

Response:

Legislative Leaders incorporate herein their General Objections as set forth above. Legislative Leaders specifically object to this Request because any documents in the possession, custody or control of the Legislative Leaders that might be responsive to the requests are documents used by the Legislative Leaders in the conduct of core legislative functions and are protected by the legislative privilege and, additionally, may be protected by the deliberative process privilege. Legislative Leaders further object to this Request because it is overly broad and unduly burdensome in that the specified time frame includes years not relevant to the claims in this litigation and in that it seeks the production of documents which are publicly available.

47. For each school year from 1991-92 through 1999-2000, all final documents sufficient to show for each school district:

(a) pupil-to-teacher ratios;

(b) available library books and text books;

(c) class size;

(d) type and number of athletic programs and facilities;

(e) age or condition of buildings and/or facilities;

(f) curriculum offerings;

(g) teacher and administrative salaries;

(h) number and age of computers for instructional use;

(i) data or other information on teacher hiring; and

(j) number and percentage of teachers lacking state certification.

Response:

Legislative Leaders incorporate herein their General Objections as set forth above. Legislative Leaders specifically object to this Request because any documents in the possession, custody or control of the Legislative Leaders that might be responsive to the requests are documents used by the Legislative Leaders in the conduct of core legislative functions and are protected by the legislative privilege and, additionally, may be protected by the deliberative process privilege. Legislative Leaders further object to this Request because it is overly broad and unduly burdensome in that the specified time frame includes years not relevant to the claims in this litigation and in that it seeks the production of documents which are publicly available and in the possession, custody or control of others.

48. All documents sufficient to show student performance in each school district in Pennsylvania, disaggregated by race and ethnicity, for each school year

from 1991-92 through 1999-2000, including but not limited to:

(a) test scores on the Pennsylvania System of School Assessment test;

(b) Scholastic Aptitude Test and Scholastic Achievement Test scores;

(c) National Assessment for Educational Progress test scores;

(d) high school graduation rates; and

(e) college matriculation rates

Response:

Legislative Leaders incorporate herein their General Objections as set forth above. Legislative Leaders specifically object to this Request because any documents in the possession, custody or control of the Legislative Leaders that might be responsive to the requests are documents used by the Legislative Leaders in the conduct of core legislative functions and are protected by the legislative privilege and, additionally, may be protected by the deliberative process privilege. Legislative Leaders further object to this Request because it is overly broad and unduly burdensome in that the specified time frame includes years not relevant to the claims in this litigation and in that it seeks the production of documents which are publicly available and in the possession, custody or control of others.

February 22, 2000

Respectfully submitted,

/S/

APPENDIX I

EXCERPTS FROM: MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION TO COMPEL DISCOVERY FROM LEGISLATIVE LEADERS

Plaintiffs hereby submit this Memorandum in support of their Motion, pursuant to Federal Rule of Civil Procedure 37 and Local Rule of Civil Procedure 26.1, for an order compelling the legislative leaders Matthew Ryan, Robert C. Jubelirer, Jess M. Stairs and James J. Rhodes ("intervenors") to produce documents pursuant to Plaintiffs' First Set of Requests for Production of Documents served upon each, and to require them to provide answers to the School District of Philadelphia's First Set of Interrogatories. After significant discussion of intervenors' blanket refusal to produce any documents responsive to plaintiffs' 48 document requests, intervenors have agreed to produce approximately 25 pages of documents. Plaintiffs request the assistance of this Court in order to discover the facts necessary for decision of their claims.

Background

After remand by the Third Circuit, and denial by the Supreme Court of defendants' and intervenors' petitions for *certiorari,* on January 20,2000, this Court entered a scheduling order which directed, *inter alia,* the completion of discovery in this matter on or before October 9, 2000. On January 18, 2000, plaintiffs initiated discovery, serving upon each of the legislative branch intervenors an initial set of requests for production of documents. These requests were identical in all respects, except that each was addressed to an individual defendant. A copy of the request served upon intervenor James J. Rhodes is attached to the Motion as Exhibit " A." The document requests are

directed at discovering basic information, now in the hands of defendants and intervenors, that plaintiffs will require to prove their case. The major categories of documents requested and purposes served by the requests are as follows:

First, plaintiffs seek documents reflecting all Commonwealth funding for public education, including and beyond Basic Education Funding ("BEF"), generally for the period from 1991-92 through 1999-2000. See Exhibit "A", ¶¶ 10-26. Such documents are relevant to test the accuracy of the affidavits defendants have submitted in support of their Motion for Summary Judgment, to review all Commonwealth funding for years other than the single year the defendants have targeted in that Motion, and to understand precisely how BEF funding, total Commonwealth treasury revenue and total revenue operate so that plaintiffs and their experts may analyze the complete data. The document requests also seek BEF data over time (1991-92 through 1999-2000), which is highly relevant to plaintiffs' allegations concerning changes in BEF beginning in 1992-93. See Complaint, ¶¶ 48-51. All of the information concerning Commonwealth treasury revenue, and other revenue produced pursuant to Commonwealth statutes, is necessary to build on the analysis plaintiffs described in paragraphs 53-55 of the Complaint, which demonstrates that in districts with similar numbers of poor students, those with higher proportions of white students receive more Commonwealth treasury revenues than those with higher proportions of minority students.

Plaintiffs also seek discovery relevant to their allegations that "Commonwealth Defendants had knowledge of such [racially disparate] effects each time prior to taking action which achieved these results."

Complaint, ¶ 60. The defendants and intervenors are the custodians of the facts concerning what they knew about the adverse racial impact of their school funding decisions on minority students and school districts. It is only through discovery concerning what defendants and intervenors said and did, and why, that this issue can be developed. Document requests 7-12 begin to probe this issue, on which the Third Circuit contemplated that plaintiffs are entitled to discovery . Powell v. Ridge, 189 F.3d 387, 393 n.1 (3d Cir.), cert. denied, 120 S. Ct. 579 (1999).

Plaintiffs also seek documents reflecting the nature, extent and distribution of federal funding for public education in Pennsylvania, a large part of which goes through the Commonwealth treasury and is appropriated by the legislature. Exhibit "A," ¶¶ 27-34. Such factual information is important to demonstrate that the system of public elementary and secondary education in Pennsylvania is a "program or activity" subject to the non-discrimination mandates of Title VI and its implementing regulations. See 42 U.S.C. § § 2000d, 2000d-4a; 34 C.F.R. § 100.3(b)(1),(2). Moreover, the Title VI regulations that are the basis of Count I of the Complaint provide that within such programs or activities, federal fund recipients are prohibited from utilizing criteria or methods of administration that substantially impair "accomplishment of the objectives of the program as respect[s] individuals of a particular race, color or national origin." 34 C.F.R. § 100.3(b)(2). It is important to know what federal funding for public education defendants receive, and where it is distributed, in order to analyze whether and how achievement of the objectives of the program is impaired by the funding policies and practices adopted and implemented by defendants and intervenors.

Further requests seek documents reflecting information explaining Pennsylvania's system of school finance, Exhibit "A," ¶¶ 1-6, and the local funding portion of the Commonwealth's system of support for public education, id., ¶¶ 35-37. Total funding for public education in Pennsylvania, including the local portion which is raised pursuant to Commonwealth law, is the subject of ¶¶ 56 -57 of the Complaint, and the conclusions drawn in part from those allegations in ¶¶ 59 -66.

Document requests 38-48 are designed to begin the process of developing the proof contemplated by the Third Circuit that students in Philadelphia are harmed by the discrimination in public school funding, through, inter alia, "larger class sizes, higher pupil per teacher ratios, reduced curricula, fewer programs, and less textbooks, equipment, supplies and technology per student." Powell v. Ridge, 189 F.3d at 396.

Document discovery is the logical place where plaintiffs must begin in order to supply the facts and develop for the Court the record on all of these issues. Once the sources and authors of relevant documents are known, plaintiffs anticipate depositions of those persons most knowledgeable, inter alia, about the Commonwealth system of funding public education, how and why it has changed, the funding available to various school districts and groups of students by race, and the effects of those disparities.

On February 22, 2000, intervenors served their collective Response and Objection to Plaintiffs' First Set of Requests for Production of Documents, a copy of which is attached to the Motion as Exhibit "B." In that Response, intervenors refused to produce any documents at all, based upon a plethora of objections, most notably an objection

based on the generalized assertion of legislative or other privileges without providing a log or other means by which the assertions of privilege could be evaluated. On February 24, 2000, counsel for plaintiffs wrote to counsel for intervenors addressing the inadequacy of intervenors' response, a copy of which letter is attached to the Motion as Exhibit "C."

On February 29, 2000, counsel for plaintiffs and counsel for intervenors met to address the dispute over the sufficiency of intervenors' response. That same day, counsel for plaintiffs wrote to counsel for intervenors, confirming the substance of their conversation and the commitments of counsel for intervenors to review her clients' documents in order to provide further information on her clients' position. The documents had not been reviewed in the five weeks since the document requests were served. A copy of that letter is attached to the Motion as Exhibit "D."

On March 24, 2000, counsel for intervenors wrote to counsel for plaintiffs, stating that (1) they had no documents responsive to the majority of the requests, (2) they had -- and would produce -- "a few" documents responsive to some of the requests and (3) they had less than two boxes full of responsive documents that they claim are exempt from discovery under a claim of legislative privilege, but declining to provide a privilege log. Intervenors also stood upon their objection to the production of documents that are otherwise available in the public domain and to the production of documents that intervenors consider "outside of any time frame that could be considered relevant to this case." A copy of that letter is attached to the Motion as Exhibit "E."

While declining to provide a privilege log, intervenors did offer a general description of the documents withheld under their assertion of privilege:

> These documents are related to legislative investigation, requests for legislative action, consideration of proposed legislation, and/or evaluation of enacted legislation related, even if indirectly, to funding for public education in Pennsylvania, as defined by plaintiffs. Included within these documents are: budget requests from the Governor; Department of Education-generated proposals for BEF [Basic Education Funding], special education and other funding,. ..House and Senate bills and bill amendments concerning education, with bill and amendment analyses by legislative staff; remarks prepared for or made by one or more of the Legislative Leaders on the floor and/or to a committee; memos seeking co-sponsors for legislation, addressing the feasibility of legislation, related to committee meetings and transmitting materials; testimony and materials presented/submitted to legislative committees; documents evaluating and proposing methods for funding public education; and reports and updates send by PDE [Pa. Department of Education] to members of the General Assembly relating to various grant programs. [Exhibit "E"].

Intervenors stated that the "privileged" documents are responsive to requests nos. 1, 4, 5, 6, 7, 9, 10, 11 and

12.[1] For the reasons set forth within, the documents at issue are highly relevant to the development of plaintiffs' case and, indeed, many go to facts which will support the heart of this litigation.

On February 25, 2000, the School District of Philadelphia served its First Set of Interrogatories. Those interrogatories seek information that parallels, in great measure, the document requests, but also request specific information, *inter alia,* concerning the factors and information considered in the budgetary process that determined levels of state funding for education since 1991-92. Intervenors served their responses on March 29, 2000. The only substantive responses provided to the interrogatories was intervenors' assertion that the legislative leaders lacked certain or the information requested in several of the interrogatories. In their responses, intervenors asserted the same positions with respect to claims of privilege, the production of information that is available to the public, and the relevant-time frame for discovery in this litigation as underlies their refusal to produce documents. The Response and Objection served on behalf of Representative Matthew Ryan, which is substantively identical to the others, is attached to the Motion as Exhibit "F." Based on intervenors' steadfast position regarding documents and its consistent objections to interrogatories, any further attempt to resolve disputes concerning the interrogatories would be an exercise in futility.

---

[1] Intervenors now state in their letter that they have no documents responsive to requests 2, 3, 8, 13- 25, 27- 48, even such basic documents as "documents sufficient to explain appropriations, expenditures, allocations, and funding formulas for public education in Pennsylvania." (request no.3) They are silent with respect to request 26. See Exhibit E.

Given the schedule established by this Court for the completion of pretrial proceedings and trial of this action, plaintiffs have no choice but to promptly pursue a motion to compel discovery to resolve the issues presented by the Intervenors' objections

****

APPENDIX J

LETTER FROM COUNSEL FOR LEGISLATIVE LEADERS TO PLAINTIFFS' COUNSEL

March 24, 2000

James J. Rodgers, Esq.
Dilworth Paxson LLP
3200 Mellon Bank Center
1735 Market Street
Philadelphia, PA 19103-7525

Re: *Powell v. Ridge*/discovery

Dear Jim:

Our clients have conducted a review of their files to determine if they contain documents responsive to plaintiffs' first request for production. The files reviewed were those of Representative Ryan, Representative Stairs, including those of the House Education Committee which he chairs, Senator Jubelirer and Senator Rhoades, including those of the Senate Education Committee which he chairs. No responsive documents were found with respect to Requests 2, 3, 8, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48. The responsive, but privileged, documents would probably fill less than two banker's boxes. Providing a privilege log with the detail sought by plaintiffs is contrary to the basis of the legislative privilege. We are, however, providing you with descriptions of the kinds of documents that exist.

Responsive documents were located to Requests 1, 4, 5, 6, 7, 9, 10, 11 and/or 12. A few of these documents

are not protected by the legislative privilege. These include documents related to presentations made to groups outside the legislature and articles/letters-to-the-editor by one or more legislators related to funding for public education. Legislative Leaders do not believe these documents are relevant to this litigation. Further, some are outside any time frame that could be considered relevant to this case. However, without waiving any objections and privileges, these documents will be made available for your inspection and copying if you would like to review them.

The rest of the responsive documents, whether public or not, are protected from discovery by the legislative privilege. These documents are related to legislative investigations, requests for legislative action, consideration of proposed legislation, and/or evaluation of enacted legislation related, even if indirectly, to funding for public education in Pennsylvania, as defined by plaintiffs. Included within these documents are: budget requests from the Governor; Department of Education-generated proposals for BEF, special education and other funding, although none are earlier than 1996-97; House and Senate bills and bill amendments concerning education, with bill and amendment analyses by legislative staff; remarks prepared for or made by one or more of the Legislative Leaders on the floor and/or to a committee; memos seeking co-sponsors for legislation, addressing the feasibility of legislation, related to committee meetings and transmitting materials; testimony and materials presented/submitted to legislative committees; documents evaluating and proposing methods for funding public education; and reports and updates sent by PDE to members of the General Assembly relating to various grant programs. With the exception of some pre-1995 information related to funding received/to be received by the school districts in one legislator's district, the earliest document is dated 1995.

Many of the responsive documents are publicly available, i.e., found in the laws and regulations of the Commonwealth of Pennsylvania or obtainable from PDE (some are available on the PDE web site). Legislative Leaders object to the production of any document that is publicly available or in the possession of others. Some of the responsive documents are also protected by the deliberative process privilege, and Legislative Leaders specifically object to their production on that basis, as well as the legislative privilege. Further, Legislative Leaders object to the relevancy of the time frame for which plaintiffs request documents.

You also asked a number of questions concerning legislative files. Those questions are similar to those in the School District's First Set of Interrogatories, responses to which are due the week of March 27. With respect to federal funds, your letter of February 29, 2000 assumes the General Assembly has "some data available showing or projecting receipt of federal funds" by the Commonwealth because the General Assembly appropriates those funds. The General Assembly, however, has no role in obtaining those funds. The Department of Education, on behalf of the Commonwealth of Pennsylvania, applies for them. The Governor's budget proposal details the federal funds, available or anticipated.

The General Assembly appropriates federal funds in the annual general appropriations act, which provides the authorization necessary for the disbursement of the funds. Each year's general appropriations act, which details the amounts appropriated, is a statute. You will not find appropriations acts in Purdon's, but in the collected Laws of Pennsylvania. They do not need to be disclosed in discovery, because the bench and bar have notice of them.

Please contact me if you would like to review the non-privileged documents or if you have any other questions.

Sincerely,

/S/
Linda J. Shorey

cc: Patricia A. Brannan
Jane Lovitch Istvan
Michael Churchill
William T. Coleman
Edward F. Maninno

APPENDIX K

ORDER OF IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

AND NOW, this 1st day of May 2000, upon consideration of the Stipulation of Counsel re: Extension of Time for Legislative Leaders to File Response to Plaintiffs' Motion, the Legislative Leaders' Motion to Reconsideration and Vacatur (Docket No. 70), and the Legislative Leaders' Response in Opposition to Plaintiffs' Motion to Compel Discovery from Legislative Leaders (Docket No. 71), it is HEREBY ORDERED that:

(1) the Stipulation of Counsel re: Extension of Time for Legislative Leaders to file Response to Plaintiffs' Motion is DENIED as moot;[1]

(2) the Legislative Leaders' Motion for Reconsideration and Vacatur (Docket No. 70) is DENIED.[2]

---

[1] As the Court was not in receipt of the Legislative Leaders' response to Plaintiff's Motion to Compel by April 24, 2000, the Court granted Plaintiffs' Motion to Compel on April 25, 2000. Therefore, the Stipulation of Counsel is denied as moot.

[2] This Court dismissed Plaintiff's Complaint pursuant to Federal Rule of Civil Procedure 12 (b)(6) on or about November 19, 1998, and Plaintiffs thereafter appealed to the Third Circuit Court of Appeals. The Third Circuit reversed and remanded. The Third Circuit, upon review of this Court's prior decision, stressed the importance of Plaintiffs' ability to conduct discovery. See *Powell v. Ridge*, 189 F.3d 387, 396-97, 399, 400 (3d Cir. 1999). The Legislative Leaders contend in their instant motion that they are protected by the doctrine of legislative immunity from complying with the Court's Order of April 25, 2000, which compels them to comply with Plaintiffs' discovery requests.

While the Legislative Leaders' argument might have merit in other contexts, the Third Circuit stated that the

By the Court:

/S/
Herbert J. Hutton, J.

"defendants in this case are on notice that plaintiffs intend to prove that their funding formula produces disparate effects, and the defendants are in as good a position as anybody to know precisely what the funding formula entails." Id. at 397. "It may be that some of the necessary information will be forthcoming from the defendants' files and employees during discovery." Id. In light of the Third Circuit's mandate, the Legislative Leaders' instant Motion is denied.

APPENDIX L

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

June 19, 2000

No. 00-1855

(Related to E.D. of PA. Civil No. 98-cv-01223 (HJH))

Present : MCKEE, BARRY and FUENTES, Circuit Judges.

The foregoing petition for a writ of mandamus is denied. We note that petitioners can ask the District Court to act on their pending request to certify an interlocutory appeal and can seek a protective order. We take no position on whether either or both of these requests should be granted.

By the Court,

/S/
Maryanne Trump Barry

Circuit Judge

Dated: July 31, 2000

APPENDIX M

FEDERAL RULE OF CIVIL PROCEDURE 26

Rule 26. General Provisions Governing Discovery; Duty of Disclosure.

****

(b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows: (1) In General. Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party,

****

(5) Claims of Privilege or Protection of Trial Preparation Materials. When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

APPENDIX N

FEDERAL RULE OF CIVIL PROCEDURE 24

Rule 24. Intervention. (a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties. (b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties. (c) Procedure. A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to intervene. When the constitutionality of an act of Congress affecting the public interest is drawn

in question in any action in which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of the United States as provided in Title 28, U.S.C. § 2403. When the constitutionality of any statute of a State affecting the public interest is drawn in question in any action in which that State or any agency, officer, or employee thereof is not a party, the court shall notify the attorney general of the State as provided in Title 28, U.S.C. § 2403. A party challenging the constitutionality of legislation should call the attention of the court to its consequential duty, but failure to do so is not a waiver of any constitutional right otherwise timely asserted.

APPENDIX O

SECTION 100.3 OF TITLE 34 OF THE CODE OF FEDERAL REGULATIONS

Sec. 100.3 Discrimination prohibited. (a) *General.* No person in the United States shall, on the ground of race, color, or national origin be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program to which this part applies. (b) *Specific discriminatory actions prohibited.* (1) A recipient under any program to which this part applies may not, directly or through contractual or other arrangements, on ground of race, color, or national origin: (i) Deny an individual any service, financial aid, or other benefit provided under the program; (ii) Provide any service, financial aid, or other benefit to an individual which is different, or is provided in a different manner, from that provided to others under the program; (iii) Subject an individual to segregation or separate treatment in any matter related to his receipt of any service, financial aid, or other benefit under the program; (iv) Restrict an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid, or other benefit under the program; (v) Treat an individual differently from others in determining whether he satisfies any admission, enrollment, quota, eligibility, membership or other requirement or condition which individuals must meet in order to be provided any service, financial aid, or other benefit provided under the program; (vi) Deny an individual an opportunity to participate in the program through the provision of services or otherwise or afford him an opportunity to do so which is different from that afforded others under the program (including the opportunity to participate in the program as an employee but only to the extent set forth in paragraph (c) of this

section). (vii) Deny a person the opportunity to participate as a member of a planning or advisory body which is an integral part of the program. (2) A recipient, in determining the types of services, financial aid, or other benefits, or facilities which will be provided under any such program, or the class of individuals to whom, or the situations in which, such services, financial aid, other benefits, or facilities will be provided under any such program, or the class of individuals to be afforded an opportunity to participate in any such program, may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin. (3) In determining the site or location of a facilities, an applicant or recipient may not make selections with the effect of excluding individuals from, denying them the benefits of, or subjecting them to discrimination under any programs to which this regulation applies, on the ground of race, color, or national origin; or with the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the Act or this regulation. (4) As used in this section, the services, financial aid, or other benefits provided under a program receiving Federal financial assistance shall be deemed to include any service, financial aid, or other benefits provided in or through a facility provided with the aid of Federal financial assistance. (5) The enumeration of specific forms of prohibited discrimination in this paragraph and paragraph (c) of this section does not limit the generality of the prohibition in paragraph (a) of this section. (6)(i) In administering a program regarding which the recipient has previously discriminated against persons on the ground of race, color,

or national origin, the recipient must take affirmative action to overcome the effects of prior discrimination. (ii) Even in the absence of such prior discrimination, a recipient in administering a program may take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin. (c) *Employment practices.* (1) Where a primary objective of the Federal financial assistance to a program to which this regulation applies is to provide employment, a recipient may not (directly or through contractual or other arrangements) subject an individual to discrimination on the ground of race, color, or national origin in its employment practices under such program (including recruitment or recruitment advertising, employment, layoff or termination, upgrading, demotion, or transfer, rates of pay or other forms of compensation, and use of facilities), including programs where a primary objective of the Federal financial assistance is (i) to reduce the employment of such individuals or to help them through employment to meet subsistence needs, (ii) to assist such individuals through employment to meet expenses incident to the commencement or continuation of their education or training, (iii) to provide work experience which contributes to the education or training of such individuals, or (iv) to provide remunerative activity to such individuals who because of handicaps cannot be readily absorbed in the competitive labor market. The following, under existing laws, have one of the above objectives as a primary objective: (A) Projects under the Public Works Acceleration Act, Pub. L. 87-658, 42 U.S.C. 2641-2643. (B) Work-study under the Vocational Education Act of 1963, as amended, 20 U.S.C. 1371-1374. (C) Programs assisted under laws listed in appendix A as respects employment opportunities provided thereunder, or in facilities provided thereunder, which are limited, or for which preference is given, to students, fellows, or other

persons in training for the same or related employments. (D) Assistance to rehabilitation facilities under the Vocational Rehabilitation Act, 29 U.S.C. 32-34, 41a and 41b. (2) The requirements applicable to construction employment under any such program shall be those specified in or pursuant to Part III of Executive Order 11246 or any Executive order which supersedes it. (3) Where a primary objective of the Federal financial assistance is not to provide employment, but discrimination on the ground of race, color, or national origin in the employment practices of the recipient or other persons subject to the regulation tends, on the ground of race, color, or national origin, to exclude individuals from participation in, to deny them the benefits of, or to subject them to discrimination under any program to which this regulation applies, the foregoing provisions of this paragraph (c) shall apply to the employment practices of the recipient or other persons subject to the regulation, to the extent necessary to assure equality of opportunity to, and nondiscriminatory treatment of, beneficiaries. (d) *Indian health and Cuban refugee services.* An individual shall not be deemed subjected to discrimination by reason of his exclusion from the benefits of a program limited by Federal law to individuals of a particular race, color, or national origin different from his. (e) *Medical emergencies.* Notwithstanding the foregoing provisions of this section, a recipient of Federal financial assistance shall not be deemed to have failed to comply with paragraph (a) of this section if immediate provision of a service or other benefit to an individual is necessary to prevent his death or serious impairment of his health, and such service or other benefit cannot be provided except by or through a medical institution which refuses or fails to comply with paragraph (a) of this section.

Authority: (Sec. 601, 602, 604, Civil Rights Act of 1964; 78 Stat. 252, 253, 42 U.S.C. 2000d, 2000d-1, 2000d-3)

APPENDIX P

PENNSYLVANIA CONSTITUTION
ARTICLE 3, SECTION 14

The General Assembly shall provide for the maintenance and support of a thorough and efficient system of public education to serve the needs of the Commonwealth. (PA. CONST. art. III § 14)

PENNSYLVANIA CONSTITUTION
ARTICLE 2, SECTION 15

[I]n all cases . . .[the members of the General Assembly] for any speech or debate in either House they shall not be questioned in any other place. (PA. CONST. art. II § 15)

UNITED STATES CONSTITUTION
ARTICLE 1, SECTION 6, CLAUSE 1

[I]n all cases, . . . for any Speech or Debate in either House [the Senators and Representatives] shall not be questioned in any other place. (U.S. CONST. art. 1, § 6, cl. 1)

No. 00-1854

Supreme Court, U.S.
FILED
JUL 13 2001
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

MATTHEW J. RYAN, ET AL.,

Petitioners,

v.

DAVID POWELL, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION

Patricia A. Brannan
HOGAN & HARTSON L.L.P.
555 13th Street, N.W.
Washington, D.C. 20004
(202) 637-8686

William T. Coleman, Jr.*
Stephen J. Harburg
O'MELVENY & MYERS LLP
555 13th Street, N.W.
Washington, D.C. 20004
(202) 383-5325

James J. Rodgers
Lynn R. Rauch
DILWORTH PAXSON LLP
3200 Mellon Bank Center
1735 Market Street
Philadelphia, PA 19103
(215) 575-7000

Michael Churchill
Thomas K. Gilhool
PUBLIC INTEREST LAW CENTER OF PHILADELPHIA
125 South Ninth Street
Philadelphia, PA 19107
(215) 627-7100

Kenneth I. Trujillo
Richard Feder
Jane Lovitch Istvan
CITY OF PHILADELPHIA
LAW DEPARTMENT
1515 Arch Street, 17th Floor
Philadelphia, PA 19102
(215) 683-5013

*Counsel of Record

Counsel for Respondents

26 pp

RULE 29.6 STATEMENT

All Respondents are individuals, governmental bodies, or membership organizations. None of the incorporated membership organizations has a parent company or nonwholly owned subsidiary corporation.

TABLE OF CONTENTS

	Page
RULE 29.6 STATEMENT	i
TABLE OF AUTHORITIES	iii
INTRODUCTION	1
COUNTERSTATEMENT	2
A. Procedural Background	2
B. Facts Underlying Discovery Requests	4
REASONS FOR DENYING THE WRIT	5
I. THE THIRD CIRCUIT'S DECISION IS CONSISTENT WITH THE ACCEPTED RULE THAT DISCOVERY ORDERS ARE NOT APPEALABLE UNDER THE COLLATERAL ORDER DOCTRINE	6
A. There Is Nothing About The Third Circuit's Refusal To Involve Itself In Discovery In An Ongoing Case That Warrants This Court's Review	6
B. There Is No Applicable Privilege From Discovery For These State Legislators	12
II. THE "DANGER" PETITIONERS FORETELL IS ILLUSORY AND FAILS TO JUSTIFY THE EXERCISE BY THIS COURT OF ITS DISCRETIONARY REVIEW	16
A. The Third Circuit's Ruling Will Not Have The Far Reaching Impact Petitioners Contend	16
B. Petitioners Created The Situation They Face	17
C. Petitioners' Anti-Waiver Argument Is Not Before The Court	18
CONCLUSION	19

TABLE OF AUTHORITIES

Page

CASES:

Agromayor v. Colberg, 738 F.2d 55 (1st Cir. 1984) 11

A-Mark Auction Galleries, Inc. v. American Numismatic Ass'n, 233 F.3d 895 (5th Cir. 2000) 9

Anthony v. Baker, 955 F.2d 1395 (10th Cir. 1992) 11

Auriemma v. Montgomery, 860 F.3d 273 (7th Cir. 1988) 11

Bacher v. Allstate Ins. Co., 211 F.3d 52 (3rd Cir. 2000) ..... *passim*

Bines v. Kulaylat, 215 F.3d 381 (3rd Cir. 2000) 11

Bogan v. Scott-Harris, 523 U.S. 44 (1998) 13

Boughton v. Cotter, 10 F.3d 746 (10th Cir. 1993) 9

Brown v. Griesenauer, 970 F.2d 431 (8th Cir. 1992) 11

Brown & Williamson Tobacco Corp. v. Williams, 62 F.3d 408 (D.C. Cir. 1995) 14

Burtnick v. McLean, 76 F.3d 611 (4th Cir. 1996) 15

Campaign for Fiscal Equity v. New York, 719 N.Y.S.2d 475 (N.Y. Sup. Ct. 2001) 16

Chateaubriand v. Gaspard, 97 F.3d 1218 (9th Cir. 1996) 11

Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949) 7

Coleman v. American Red Cross, 979 F.2d 1135 (6th Cir. 1992) 9

Cunningham v. Hamilton County, 527 U.S. 198 (1999) 7, 8

Dellwood Farms, Inc. v. Cargill, Inc., 128 F.3d 1122 (7th Cir. 1997) 9

Digital Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863 (1994) 7

TABLE OF AUTHORITIES -- Continued

	Page
Dombrowski v. Eastland, 387 U.S. 82 (1967)	14
Eastland v. U.S. Servicemen's Fund, 421 U.S. 491 (1975)	14
Ellis v. Coffee County Bd. of Registrars, 981 F.2d 1185 (11th Cir. 1993)	11
F.D.I.C. v. Ogden Corp., 202 F.3d 454 (1st Cir. 2000)	9
Front Royal & Warren County Indus. Park v. Town of Front Royal, 865 F.2d 77 (4th Cir. 1989)	11
Goldberg v. Town of Rocky Hill, 973 F.2d 70 (2nd Cir. 1992)	11
Government of Virgin Islands v. Lee, 775 F.2d 514 (3rd Cir. 1985)	14, 15
Gravel v. United States, 408 U.S. 606 (1972)	15
Helstoski v. Meanor, 442 U.S. 500 (1979)	11
In re Grand Jury, 821 F.2d 946 (3rd Cir. 1987), *cert. denied*, 484 U.S. 1025 (1988)	15
In re Kessler, 109 F.3d 1015 (D.C. Cir. 1996)	9
In re United States v. Peck, 680 F.2d 9 (2nd Cir. 1982)	9
Iowa Beef Processors, Inc. v. Bagley, 601 F.2d 949 (8th Cir. 1979)	9
Lauro Lines, S.L.R. v. Chasser, 490 U.S. 495 (1989)	11
Liberty Mutual Ins. Co. v. Louisiana Dept. of Ins., 62 F.3d 115 (5th Cir. 1995)	11
Lunderstadt v. Colafella, 885 F.2d 66 (3rd Cir. 1989)	14
Marchetti v. Bitterolf, 968 F.2d 963 (9th Cir. 1992)	9
MINPECO, S.A. v. Conticommodity Services, Inc., 844 F.2d 856 (D.C. Cir. 1988)	14
Mitchell v. Forsyth, 472 U.S. 511 (1985)	11
Nixon v. Fitzgerald, 457 U.S. 731 (1982)	11
Powell v. Ridge, 247 F.3d 520 (3rd Cir. 2001)	*passim*

TABLE OF AUTHORITIES -- Continued

	Page
Powell v. Ridge, 189 F.3d 387 (3rd Cir. 1999)	3, 4
Prince v. Hicks, 198 F.3d 607 (6th Cir. 1999)	11
Quantum Corp. v. Tandon Corp., 940 F.2d 642 (Fed. Cir. 1991)	9
Ridge v. Powell, 528 U.S. 1046 (1999)	3
Ryan v. Powell, 528 U.S. 1046 (1999)	3
Shapp v. Sloan, 391 A.2d 595 (Pa. 1978)	5
Simmons v. City of Racine, PFC (Police and Fire Comm'n), 37 F.3d 325 (7th Cir. 1994)	9
Supreme Court of Virginia v. Consumers Union of the U.S., 446 U.S. 719 (1980)	13
Tenney v. Brandhove, 341 U.S. 367 (1951)	13
United States v. Gillock, 445 U.S. 360 (1980)	15
United States v. Helstoski, 442 U.S. 477 (1979)	15
United States v. Ryan, 402 U.S. 530 (1971)	8
Van Cauwenberghe v. Biard, 486 U.S. 517 (1988)	11
CONSTITUTIONAL PROVISIONS:	
Speech or Debate Clause of the Constitution of the United States, Art. I, §6	14, 15
STATUTES:	
42 U.S.C. §1983	2, 13
42 U.S.C. §§2000d to 2000d-7	2, 3
RULES AND REGULATIONS:	
Supreme Court Rule 10	5
34 C.F.R. §100.3(b)	2
Federal Rule of Civil Procedure 12	3

IN THE

Supreme Court of the United States

No. 00-1854

MATTHEW J. RYAN, ET AL.,

Petitioners,

v.

DAVID POWELL, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF IN OPPOSITION

INTRODUCTION

Petitioners -- four leaders of the Pennsylvania General Assembly ("Petitioners" or "Legislative Leaders") who voluntarily intervened as defendants and who have participated fully as parties to this action -- seek review of the judgment of the Court of Appeals for the Third Circuit dismissing their interlocutory appeal from a discovery order.

Petitioners cannot demonstrate that the Third Circuit's application of the collateral order doctrine, in finding the District Court's order compelling discovery unreviewable, conflicts with prior decisions of this Court or of other courts of appeals. Petitioners instead argue the merits of their self-styled discovery "privilege" based on legislative immunity from liability. In asking this Court to review the dismissal of

their appeal from a discovery order, Petitioners effectively seek an expansive ruling which would insulate state legislators from discovery even in suits into which they voluntarily intervene and show every intention of actively participating as defendants.

The cavalier argument of these Petitioners -- that they may articulate their views when it suits their purpose, but invoke a discovery shield when it does not -- presents no compelling issue for this Court's review, will have no national significance and is not worthy of this Court's consideration. Petitioners' bid to have the courts of appeals resolve their interlocutory discovery disputes must be declined.

COUNTERSTATEMENT

A. Procedural Background

Plaintiffs filed the underlying action in March 1998, asserting that Pennsylvania's method of funding public education had racially discriminatory effects, known in advance, in Philadelphia and other predominantly minority school districts in violation of the regulations adopted by the United States Department of Education implementing Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§2000d to 2000d-7, *see* 34 C.F.R. §100.3(b), and under 42 U.S.C. §1983. The action was brought by students and parents, organizations, and School District of Philadelphia ("School District") and City of Philadelphia officials initially only against the Governor, Secretary of Education, State Treasurer and Chair of the State Board of Education of Pennsylvania ("Executive Branch Defendants"), and seeks only declaratory and injunctive relief.

In May 1998, Legislative Leaders voluntarily moved to intervene, in order, as they admit, to "give voice to the [General Assembly's] concerns and arguments" and to "articulate to the Court the unique perspective of the legislative branch of the Pennsylvania government." Petition

for a Writ of Certiorari ("Petition") at 5-6, 23. Shortly after their Motion to Intervene was granted, Petitioners filed a Motion for Judgment on the Pleadings or to Dismiss the Complaint, and later filed a Supplemental Motion for Judgment on the Pleadings, both pursuant to Rule 12 of the Federal Rules of Civil Procedure. None of their Rule 12 arguments was premised on legislative immunity.

The District Court granted the Rule 12 motions, dismissing plaintiffs' Complaint on November 18, 1998. On appeal, the Third Circuit reversed and remanded. *Powell v. Ridge*, 189 F.3d 387 (3rd Cir. 1999). [1] In reinstating the Complaint, the Third Circuit rejected various arguments offered in support of the Rule 12 motions on the ground that such points could be tested only upon a developed record, following discovery. *See id.* at 394, 396. The Court specifically contemplated that plaintiffs would seek discovery relevant to their allegations that defendants "had knowledge of such [racially disparate] effects each time prior to taking action which achieved these results." App. 49a-50a; *see Powell,* 189 F.3d at 393 n.1 (anticipating that with discovery the complaint contains allegations which would permit plaintiffs to make a case directly under 42 U.S.C. §2000d).

Accordingly, plaintiffs pursued discovery, including requests for production of documents and interrogatories served upon the four intervenors, by name, seeking basic information relating to formulas for funding public education and changes therein over time, the distribution of federal funds for public education in Pennsylvania, knowledge of the racially discriminatory formulas prior to taking action, and harm to students by virtue of discriminatory funding. (App.

---

[1] Petitioners, who had briefed and argued in the Third Circuit, filed a petition for certiorari to this Court, independently of a petition filed by the Executive Branch defendants. This Court denied both petitions. *Ryan v. Powell*, 528 U.S. 1046 (1999); *Ridge v. Powell*, 528 U.S. 1046 (1999).

78a-136a.) Petitioners' initial response was a complete refusal to produce any documents whatsoever and a series of objections on various grounds that provided no information regarding the extent of responsive documents in their possession or under their control. *Id.* After communications among counsel, Petitioners searched their files to determine what documents they had that were responsive to the document requests. (App. 145a-148a.) They ultimately produced only 56 pages of documents, claiming that the remainder of the responsive documents were protected from discovery based upon a blanket "legislative privilege."

Unable to resolve the discovery dispute as to the purportedly privileged information, plaintiffs filed a Motion to Compel. (App. 137a-144a.) The District Court granted the Motion, rejecting Petitioners' arguments concerning their purported legislative privilege and noting that the Third Circuit had "stressed the importance of Plaintiffs' ability to conduct discovery. *See Powell v. Ridge*, 189 F.3d 387, 396-97, 399, 400 (3d Cir. 1999)." (App. 149a.)

Legislative Leaders appealed to the Third Circuit, which entertained letter briefs on the issue of appealability of the District Court's discovery order as well as merits briefs and oral argument. On April 6, 2001, the Third Circuit dismissed the appeal on the basis that the District Court's discovery order was not immediately appealable under the collateral order doctrine. App. 1a-22a, *Powell v. Ridge*, 247 F.3d 520 (3rd Cir. 2001). Legislative Leaders thereupon filed their Petition seeking review by this Court.

B. Facts Underlying Discovery Requests

The School District educates children in grades kindergarten-12, with a student body of nearly 80% African-American, Hispanic, Asian and other minorities. (App. 35a.) Non-white enrollment in public schools in the rest of Pennsylvania as a whole is only approximately 11%. *Id.* The minority students in Philadelphia public schools

comprise nearly 50% of the total minority public school population in Pennsylvania. *Id.*

The Commonwealth funds public education through an annually changing statutory system that depends upon a combination of locally generated revenues authorized by the Commonwealth, state funds and certain federal funds. (App. 45a.) Federal K-12 education funds are appropriated to school districts through Commonwealth legislative and gubernatorial actions. *See Shapp v. Sloan*, 391 A.2d 595 (Pa. 1978).

Plaintiffs allege, and have sought discovery to prove, that the Commonwealth's criteria and methods of funding public education are racially discriminatory with regard to Philadelphia and other predominantly minority school districts. Funding per child is less in the predominantly minority School District than per child in those otherwise similarly situated districts that educate predominantly white students, and racial disparities in per child spending also have increased over time. (App. 45a-50a.) These funding decisions were made each time with knowledge in advance that they were discriminatory and had adversely harmed minority children. (App. 40a-50a.)

REASONS FOR DENYING THE WRIT

Petitioners present no "compelling reasons" for this Court to grant this Petition for a Writ of Certiorari. Supreme Court Rule 10. The ruling below presents a commonplace decision by a court of appeals not to involve itself in discovery disputes in an ongoing district court litigation. Contrary to Petitioners' assertion, this case presents neither a conflict with a decision of this Court or other courts of appeals nor an unsettled question of federal law concerning the well-established principle that appeals from discovery orders are not appealable as collateral orders. Straining to create the illusion of a circuit split, Petitioners treat the issue as one regarding the availability of immunity (rather than

discovery), and in the process base their argument on a fundamental misconception of both the nature of the order being appealed as well as the nature and scope of legislative immunity.

I. THE THIRD CIRCUIT'S DECISION IS CONSISTENT WITH THE ACCEPTED RULE THAT DISCOVERY ORDERS ARE NOT APPEALABLE UNDER THE COLLATERAL ORDER DOCTRINE

A. There Is Nothing About the Third Circuit's Refusal To Involve Itself In Discovery In An Ongoing Case That Warrants This Court's Review

Petitioners contend that this Court should grant certiorari to hear this unremarkable discovery dispute because the Third Circuit's decision allegedly conflicts "with decisions of this Court and all other circuits, including the Third Circuit." Petition at 19. Petitioners are incorrect, because the Third Circuit's decision is entirely consistent with the universally accepted rule that ***discovery orders are not appealable under the collateral order doctrine***. The alleged "conflict" is Petitioners' own creation, which ignores the actual basis of the Third Circuit's decision.

The issue decided by the Court of Appeals was straightforward: whether a district court's discovery order that compels a party to produce documents, and rejects the party's inventive claim of privilege from discovery, is immediately appealable as a collateral order. The Third Circuit held that "the collateral order doctrine does not reach appeals of discovery orders 'beyond the narrow categories of trade secrets and *traditionally recognized privileges*, such as attorney-client and work product.'" App. 6a, *Powell*, 247 F.3d at 524 (citations omitted; emphasis in original). The Third Circuit explained that "[u]nderlying these narrow exceptions to the general rule of non appealability is a concern that where confidential information is sought, there

is no way, absent immediate appeal of the order requiring disclosure, to 'unscramble the egg scrambled by the disclosure.'" App. 7a, *Powell*, 247 F.3d at 524 (citation omitted). No such confidentiality concerns are present here. In fact, Petitioners "explicitly disavow any such [confidentiality] interest." App. 6a-7a, *Powell*, 247 F.3d at 524.

Because the purported privilege invoked by Petitioners "is not even suggested by any reasonable reading of applicable case law," let alone "traditionally recognized," the Third Circuit dismissed Petitioners' interlocutory appeal for lack of jurisdiction. App. 11a-12a, *Powell*, 247 F.3d at 526-27. In reaching its conclusion, the Third Circuit relied heavily upon this Court's opinions in *Cunningham v. Hamilton County*, 527 U.S. 198 (1999), and *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863 (1994), as well as on its own prior decision in *Bacher v. Allstate Ins. Co.*, 211 F.3d 52 (3rd Cir. 2000). These cases apply this Court's decisions concerning the collateral order doctrine, which are based in the seminal case of *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949).

In *Digital Equipment*, for instance, this Court held that an order vacating a dismissal predicated on the parties' settlement agreement did not involve a potential loss of sufficiently "important" rights, and therefore did not satisfy an essential component of the *Cohen* test: that the decision must be effectively unreviewable upon appeal from a final judgment. *Digital Equip.*, 511 U.S. at 865. In *Digital Equipment*, Justice Souter, writing for a unanimous Court, observed that many types of interlocutory orders must remain unappealable despite the fact that review of a final judgment may not provide a perfect remedy to the allegedly aggrieved party:

> [E]rroneous evidentiary rulings, grants or denials of attorney disqualification, and restriction of the rights of

> intervening parties, may burden litigants in ways that are only imperfectly reparable by appellate reversal of a final district court judgment; and other errors, real enough, will not seem serious enough to warrant reversal at all, when reviewed after a long trial on the merits. In still other cases, an erroneous district court decision will, as a practical matter, sound the "death knell" for many plaintiffs' claims that might have gone forward if prompt error correction had been an option. *But if immediate appellate review were available every such time, Congress's final decision rule would end up a pretty puny one, and so the mere identification of some interest that would be "irretrievably lost" has never sufficed to meet the third Cohen requirement.*

Id. at 872 (citations omitted; emphasis added). *See also Cunningham*, 527 U.S. at 202-10 (order imposing sanctions on party's attorney for discovery abuse not immediately appealable as collateral order); [2] *United States v. Ryan*, 402 U.S. 530, 532 (1971) (subpoenaed party may not appeal denial of motion to quash subpoena, but must either obey or refuse to do so and appeal if subsequently cited for contempt).

In its decision below, the Third Circuit also stressed that its dismissal of Petitioners' appeal was consistent with "the approach taken by the other courts of appeals." App. 6a, *Powell*, 247 F.3d at 524. Indeed, contrary to Petitioners' claim here that the Third Circuit stands alone, courts of appeals repeatedly have held that the collateral order doctrine does *not* apply to permit an immediate appeal from orders

---

[2] In *Bacher*, the Third Circuit found *Cunningham* instructive because "the Court's statement in *Cunningham* that we should not apply the collateral order doctrine on a 'case-by-case' basis indicates that we should not attempt to carve out case-by-case exceptions to the general rule that discovery orders are not immediately appealable." 211 F.3d at 57.

compelling the production of documents, or from similar discovery orders. *See F.D.I.C. v. Ogden Corp.*, 202 F.3d 454, 458 & n. 2 (1st Cir. 2000); *In re United States v. Peck*, 680 F.2d 9, 11 (2nd Cir. 1982); *A-Mark Auction Galleries, Inc. v. American Numismatic Ass'n*, 233 F.3d 895, 899 (5th Cir. 2000); *Coleman v. American Red Cross*, 979 F.2d 1135, 1138 (6th Cir. 1992); *Simmons v. City of Racine, PFC (Police and Fire Comm'n)*, 37 F.3d 325, 327 (7th Cir. 1994); *Iowa Beef Processors, Inc. v. Bagley*, 601 F.2d 949, 953 (8th Cir. 1979); *Marchetti v. Bitterolf*, 968 F.2d 963, 967 (9th Cir. 1992); *Boughton v. Cotter*, 10 F.3d 746, 749-50 (10th Cir. 1993); *In re Kessler*, 109 F.3d 1015, 1016 (D.C. Cir. 1996); *Quantum Corp. v. Tandon Corp.*, 940 F.2d 642, 644 (Fed. Cir. 1991).

The rule that discovery orders are not immediately appealable as collateral orders "is true even of discovery orders issued over an objection that the information at issue is privileged," *Simmons, supra,* 37 F.3d at 327 (collecting cases), and *even where the privilege asserted is that of governmental immunity. Peck, supra,* 680 F.2d at 9 (refusing to make exception to general rule in case where United States Attorney General objected to discovery request under claim of executive privilege). Indeed, if there is any "conflict" between the Third Circuit and its sister courts of appeals, it is that the Third Circuit is generally more willing to consider interlocutory appeals of discovery orders, since other courts of appeals do not apply the collateral order doctrine to permit appeals of discovery orders where trade secrets or "traditionally recognized" privileges are involved. *See Bacher*, 211 F.3d at 54; *Dellwood Farms, Inc. v. Cargill, Inc.*, 128 F.3d 1122, 1125 (7th Cir. 1997) ("[A] discovery order is not deemed collateral even if it is an order denying a claim of privilege. We so held emphatically in [two prior cases] and this is the view of other circuits as well, with the partial exception of the Third Circuit") (citations omitted).

Having no rebuttal for the well-settled tenet that discovery orders are not immediately appealable as collateral orders, Petitioners do not attempt to dispute it. Instead, they ignore the basis for the Third Circuit's decision as well as the authorities the Court found persuasive, or relegate such authorities to footnotes and string cites. The Third Circuit's decision is entirely consistent with the case law of this Court and every court of appeals that has decided the issue.[3] Petitioners attempt to escape the mountain of adverse precedent -- and conjure up a "conflict" of authority -- by citing a series of inapposite decisions that deal with governmental immunity as *a defense, not to discovery, but to liability*.[4] The cases relied upon by Petitioners do not involve discovery orders. Rather, each case cited by Petitioners concerns an attempt to escape potential liability

---

[3] Petitioners also contend that the Third Circuit's decision is inconsistent with its own prior decisions, Petition at 19-22, which surely is no basis for this Court to exercise its discretionary jurisdiction. In advancing this argument, the Petition fails to discuss *Bacher*, the case that the Third Circuit found to be dispositive. Indeed, the Petition's only reference to *Bacher* is found in a string cite in footnote 11 (in which its holding is misstated).

[4] The Third Circuit carefully considered the protections afforded to legislators by virtue of absolute legislative immunity and recognized the appealability of orders denying such immunity claims on the merits. *See* App. 7a, *Powell*, 247 F.3d at 524, citing cases. While legislators under other circumstances may be entitled to immunity, their invocation of immunity for the sole purpose of insulating themselves from discovery, in a case which they willingly joined, while otherwise remaining active litigants, is hardly commonplace. "A proper invocation of legislative immunity would typically call for the dismissal of a legislator from a lawsuit." App. 9a, *Powell*, 247 F.3d at 525. *See also* App. 10a, *Powell*, 247 F.3d at 526 (dismissal is the "logical" and "appropriate result where legislative immunity applies" and "best furthers the underlying goals of the doctrine").

under a claim of governmental immunity. *See Mitchell v. Forsyth*, 472 U.S. 511 (1985) (former Attorney General claimed absolute or qualified immunity from damages in civil lawsuit); *Nixon v. Fitzgerald*, 457 U.S. 731 (1982) (former President claimed absolute immunity in civil action for money damages); *Helstoski v. Meanor*, 442 U.S. 500 (1979) (congressman claimed indictment violated Speech or Debate Clause of United States Constitution). [5]

Simply put, the decisions cited by Petitioners -- almost all of which involve orders denying motions to dismiss or for summary judgment -- have no relevance to the appealability of the District Court's discovery order in this case. As the Court explained in *Lauro Lines, S.L.R. v. Chasser*, 490 U.S. 495 (1989): "after *Mitchell*, [t]he critical question ... is whether 'the essence' of the claimed right is a right not to stand trial." *Id.* at 500 (brackets and ellipses in original) (quoting *Van Cauwenberghe v. Biard*, 486 U.S. 517, 524

---

[5] Likewise, the cases cited in footnote 12 of the Petition all involve the appealability of an order rejecting an immunity defense *on the merits*. *See Agromayor v. Colberg*, 738 F.2d 55 (1st Cir. 1984) (order denying motion to dismiss); *Goldberg v. Town of Rocky Hill*, 973 F.2d 70 (2nd Cir. 1992) (same); *Bines v. Kulaylat*, 215 F.3d 381 (3rd Cir. 2000) (order denying summary judgment); *Front Royal & Warren County Indus. Park v. Town of Front Royal*, 865 F.2d 77 (4th Cir. 1989) (order striking absolute immunity defense); *Liberty Mutual Ins. Co. v. Louisiana Dept. of Ins.*, 62 F.3d 115 (5th Cir. 1995) (order appealable where it implicitly rejected defendant's qualified immunity defense); *Prince v. Hicks*, 198 F.3d 607 (6th Cir. 1999) (order denying motion to dismiss); *Auriemma v. Montgomery*, 860 F.3d 273 (7th Cir. 1988) (same); *Brown v. Griesenauer*, 970 F.2d 431 (8th Cir. 1992) (same); *Chateaubriand v. Gaspard*, 97 F.3d 1218 (9th Cir. 1996) (order denying motion for summary judgment); *Anthony v. Baker*, 955 F.2d 1395 (10th Cir. 1992) (order denying motion to dismiss and for partial summary judgment); *Ellis v. Coffee County Bd. of Registrars*, 981 F.2d 1185 (11th Cir. 1993) (order denying summary judgment).

(1988)). Here, Petitioners claim a right to participate actively as parties in the trial and other aspects of the case, but only when it serves their purposes to do so. The Third Circuit properly rejected this argument, and distinguished many of the cases cited by Petitioners:

> Despite their understanding of legislative immunity's broad parameters, however, Legislative Leaders are not seeking immunity from this suit which, it must be remembered, they voluntarily joined. Nor are the Legislative Leaders seeking any kind of wholesale protection from the burden of defending themselves. Instead, the Legislative Leaders build from scratch a privilege which would allow them to continue to actively participate in this litigation by submitting briefs, motions and discovery requests of their own, yet allow them to refuse to comply with and, most likely, appeal from every adverse order.... [T]he privilege they propose would enable them to seek discovery, but not respond to it; take depositions, but not be deposed; and testify at trial, but not be cross-examined.

App. 8a, *Powell,* 247 F.3d at 525.

No authority recognizes a privilege that would permit state officials voluntarily to participate in litigation under such lopsided terms. The Third Circuit followed the standard course followed by the federal courts in dismissing Petitioners' interlocutory appeal of a district court's discovery order.

B. There Is No Applicable Privilege From Discovery For These State Legislators

While this Court need not even consider the existence, or more precisely the nonexistence, of the "privilege" Petitioners assert here, even if the Third Circuit's majority decision is construed as turning on the merits of Petitioners' assertion of privilege, rather than on the appealability of a

discovery order, there is no viable ground for recognizing such a privilege, particularly in the context of this case.

Petitioners posit that this is a case of "great national importance" that could have widespread consequences for the "accomplishment of legislative duties." Petition at 12. Yet, they have failed to identify any other case in which a governmental entity or official sought to intervene in litigation while at the same time shielding itself from all discovery. Instead, Petitioners wrongly equate the concepts of immunity from discovery with immunity from liability and rely on an inapposite line of cases from *Tenney v. Brandhove*, 341 U.S. 367 (1951), through *Bogan v. Scott-Harris*, 523 U.S. 44 (1998), which address legislative immunity from liability, not from discovery.

In *Tenney*, this Court discussed and found applicable only immunity from liability, not immunity from discovery. *See also Supreme Court of Virginia v. Consumers Union of the U.S.*, 446 U.S. 719, 732 (1980) ("state legislators enjoy common law immunity *from liability* for their legislative acts"; not considering immunity from discovery) (italics added). *Tenney* itself recognized the distinction between legislators who are sued as defendants and those, like Petitioners, who affirmatively involve themselves in court proceedings. 341 U.S. at 378 ("[T]his is a case in which the defendants are members of a legislature. Legislative privilege in such a case deserves greater respect than where an official acting on behalf of the legislature is sued or the legislature seeks the affirmative aid of the courts to assert a privilege.") (emphasis added). Petitioners similarly stretch *Bogan* beyond its actual meaning. *Bogan* does not hold that legislators are immune from discovery in civil suits; *Bogan* is devoid of discussion of discovery issues. Rather, the issue there was whether immunity from liability under §1983 extends to local legislators. The Court's analysis focused on the reasons for immunity from liability for legislative activity itself.

Petitioners also attempt to rely on cases providing immunity from discovery to members of the federal Congress pursuant to the Speech or Debate Clause in the Constitution of the United States. Art. I, §6. Speech or Debate Clause protections, however, do not apply here, where a federal court is applying a federal statute to state legislators. As the Third Circuit commented in *Lunderstadt v. Colafella*, 885 F.2d 66, 73 (3rd Cir. 1989), which involved state legislators, "[t]he Speech or Debate Clause of the United States Constitution is *by its terms* applicable *only* to members of the United States Senate and House of Representatives." (Emphasis added.) Similarly, in *Government of Virgin Islands v. Lee*, 775 F.2d 514, 519 (3rd Cir. 1985), the Court stated that the "Speech or Debate Clause of the United States Constitution ... is the legislative immunity provision for our *national* representatives." (Emphasis added.) *See also* authority relied upon by Petitioners: *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491 (1975) (suit against United States Senate subcommittee members regarding propriety of subcommittee investigation and issuance of federal subpoenas); *Dombrowski v. Eastland*, 387 U.S. 82 (1967) (United States Senate subcommittee members sued); *MINPECO, S.A. v. Conticommodity Services, Inc.*, 844 F.2d 856, 857 (D.C. Cir. 1988) ("[t]his case presents questions of congressional immunity under the Constitution's Speech or Debate Clause"). [6]

---

[6] Any hint by Petitioners that the law of the Third Circuit -- in declining to extend the full reach of the federal Speech or Debate Clause to state legislators -- may be different than other circuits, thus justifying a Writ in this case, is of no moment. For example, *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 420 (D.C. Cir. 1995), upon which Petitioners rely, explicitly recognized that its decision "[was] limited to discussing Congress' Speech or Debate Clause privilege." *Id.* at 423. The lone case Petitioners cite suggesting (in the context of a decision determining whether summary judgment was properly granted) that legislative immunity provides a privilege from discovery for

Petitioners quote *United States v. Helstoski*, 442 U.S. 477, 491 (1979), for the separation of powers proposition that "[l]egislative immunity is intended 'to preserve the constitutional structure of separate, coequal, and independent branches of government.'" Petition at 14. They overlook, however, that the separation of powers concerns underpinning the Speech or Debate Clause for members of Congress are not implicated in this case, since state officials are not part of a coequal branch of the federal government. *See United States v. Gillock*, 445 U.S. 360, 370 (1980) ("under our federal structure, we do not have the struggles for power between the federal and state systems such as inspired the need for the Speech or Debate Clause as a restraint on the Federal Executive to protect federal legislators"); and *In re Grand Jury*, 821 F.2d 946, 954 (3rd Cir. 1987), *cert. denied*, 484 U.S. 1025 (1988) ("The interest in preventing intrusion, [*Gillock*] held, provides no support for a privilege for state legislators in federal cases because the Federal Government has supremacy over state legislatures in areas where the Constitution grants it power to act.... 'federal interference in the state legislative process is not on the same constitutional footing with the interference of one branch of the Federal Government in the affairs of a coequal branch'") (quoting *Gillock*, 445 U.S. at 370). *See also Virgin Islands*, 775 F.2d at 520 ("the *central* role of such immunity is 'to prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary'") (*quoting Gravel v. United States*, 408 U.S. 606, 617 (1972)) (emphasis added). No such concern applies here.

---

state legislators states that this "privilege may be waived." *See Burtnick v. McLean*, 76 F.3d 611, 613 (4th Cir. 1996). *See also* App. 8a, *Powell*, 247 F.3d at 525 (*Burtnick* is "in direct contrast to this case," since target sought "to extricate himself ... *completely* from legal entanglements").

II. THE "DANGER" PETITIONERS FORETELL IS ILLUSORY AND FAILS TO JUSTIFY THE EXERCISE BY THIS COURT OF ITS DISCRETIONARY REVIEW

A. The Third Circuit's Ruling Will Not Have The Far Reaching Impact Petitioners Contend

Petitioners claim that if the Third Circuit's decision to dismiss their appeal is allowed to stand, state legislators nationwide -- as well as legislators in United States territories -- will be subject to untold harm and disruption. This claim ignores the nature and scope of the decision of which Petitioners seek review. As the Third Circuit made clear when it dismissed Petitioners' appeal, it lacked jurisdiction and therefore did not reach the merits. A decision that the courts of appeals will not entertain a stream of discovery disputes from four legislators [7] who voluntarily joined the case can hardly be said to hamper the ability of all state and territorial legislators to carry out their legislative activities. [8]

---

[7] The discovery at issue was directed only to the four Legislative Leaders who voluntarily intervened in this action. There is no issue presented concerning the other, more than 250, Pennsylvania legislators.

[8] Petitioners urge that allowing the courts of appeals not to review discovery orders somehow will result in courts prescribing educational funding formulas. Petition at 12. Their citation to *Campaign for Fiscal Equity v. New York*, 719 N.Y.S.2d 475 (N.Y. Sup. Ct. 2001), is entirely misplaced. That decision was on the merits, after trial, and had nothing to do with discovery and legislative privilege. Even if *Campaign for Fiscal Equity* were somehow relevant to the issue here, Petitioners mischaracterize the scope of the state court's order in that case. The court did not dictate the manner in which the educational funding formula -- which was determined to violate the New York Constitution as well as Title VI regulations -- had to be revised. Rather, the Court left it to the legislature "in the first instance, [to] take steps to reform the current system." 719 N.Y.S.2d at 549.

B. Petitioners Created The Situation They Face

Even if the sweeping privilege from discovery these four state legislators seek in this federal statutory case were arguably available, this would not be an appropriate case for this Court to consider the application of such a privilege. In this case, a handful of state legislators have voluntarily intervened, participated fully, and then claimed that they are completely insulated from providing any discovery on the basis of some hybrid immunity born from their desire to avoid the "distraction and burdens" of being embroiled in the litigation process into which they invited themselves. Petitioners "chose to participate." Petition at 27.

Since intervening, Petitioners' proactive approach has been to involve themselves completely in every phase of litigation, including serving discovery on plaintiffs. Petitioners' own conduct, therefore, is in stark contrast to legislators who have been sued and have from the outset attempted to disentangle themselves from litigation. *See* App. 8a-9a, *Powell*, 247 F.3d at 525 (Petitioners "have failed to come up with even one case which hints at the existence of the privilege they press. Every case Petitioners cite to support their alleged privilege features, in direct contrast to this case, a defendant or a target of a subpoena seeking to extricate himself or herself *completely* from various legal entanglements"). As the Third Circuit observed from Petitioners' briefs and oral argument:

> Unlike the reluctant participants in the cases upon which they rely, the Legislative Leaders voluntarily installed themselves as defendants. And, unlike the reluctant participants in those cases, the Leaders wish to remain as defendants and participate as long as this case is around; at no time, we note, have they invoked legislative immunity as a basis for any of their various motions to dismiss. This is simply not a case of legislators caught up in litigation in which they do not wish to be involved. Rather, these are self-made defendants who seek to turn

> what has heretofore been the shield of legislative immunity into a sword.

App. 9a, *Powell*, 247 F.3d at 525. Petitioners wish to be heard (Petition at 5-6, 23; and App. 3a, *Powell*, 247 F.3d at 522 [Legislative Leaders seek to "give voice" and "articulate ... the[ir] unique perspective"]) on their terms, but refuse to disclose in discovery what they will say, and have said, on the issues raised in this case. Their unprecedented effort should not be aided by the Court.

C. Petitioners' Anti-Waiver Argument Is Not Before The Court

Petitioners' claim that the Third Circuit construed their intervention as a waiver of some privilege is unavailing. Petition at 22-23 and n. 13. The Third Circuit did "*not* decide ... whether the very act of intervening has waived the privilege." App. 11a, *Powell*, 247 F.3d at 527 n. 4 (emphasis added). A concurring opinion expressed a view on the subject of waiver, but that was not part of the majority's holding. *See* App. 20a-21a, *Powell*, 247 F.3d at 531 (Roth, J. concurring) (rejecting Petitioners' suggestion that by "intervening [they] did not waive their privilege because any such waiver was not sufficiently explicit," remarking that "I cannot conceive ... of a more explicit waiver of immunity than willingly submitting oneself to the jurisdiction of a federal district court"). In any event, contrary to Petitioners' representation that they "explicitly reserved the right to assert the privilege at issue here" when they intervened (Petition at 6), at that time the "then-proposed intervenors referred to immunity only in passing when they stated, in a footnote in their brief, that they do not waive any 'speech or debate immunity' they may have." App. 4a n. 1, *Powell,* 247 F.3d at 522-23 n. 1. Petitioners' intervention papers were devoid of any reference to any legislative privilege against discovery.

CONCLUSION

For all of the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

Patricia A. Brannan
HOGAN & HARTSON L.L.P.
555 13th Street, N.W.
Washington, D.C. 20004
(202) 637-8686

William T. Coleman, Jr.*
Stephen J. Harburg
O'MELVENY & MYERS LLP
555 13th Street, N.W.
Washington, D.C. 20004
(202) 383-5325

James J. Rodgers
Lynn R. Rauch
DILWORTH PAXSON LLP
3200 Mellon Bank Center
1735 Market Street
Philadelphia, PA 19103
(215) 575-7000

Counsel for the President of the Board of Education and the Board of Education of the School District of Philadelphia; the Superintendent of the School District of Philadelphia and the School District of Philadelphia; and Gregory and Catherine Luzak, Shelean Parks, Yvette Bland and Fu-Zhen Xie

Michael Churchill
Thomas K. Gilhool
PUBLIC INTEREST LAW CENTER OF PHILADELPHIA
125 South Ninth Street
Philadelphia, PA 19107
(215) 627-7100

Counsel for David Powell, Patrice Everage, Julia A. Davis, Geraldine Newton, Maria M. Rivera, Mary E. Miller, the Black Clergy of Philadelphia and Vicinity, Philadelphia Branch NAACP, ASPIRA, Inc. of Pennsylvania, Parents Union for Public Schools, Citizens Committee on Public Education in Philadelphia, and Parents United for Better Public Schools

Kenneth I. Trujillo, City Solicitor
Richard Feder
Jane Lovitch Istvan
CITY OF PHILADELPHIA
LAW DEPARTMENT
1515 Arch Street, 17th Floor
Philadelphia, PA 19102
(215) 683-5013

Counsel for the Mayor of Philadelphia and the City of Philadelphia

* Counsel of Record

Dated: July 13, 2001

Supreme Court, U.S.
FILED
JUL 25 2001
OFFICE OF THE CLERK

No. 00-1854

IN THE

Supreme Court of the United States

MATTHEW J. RYAN; ROBERT C. JUBELIRER;
JESS M. STAIRS and JAMES J. RHOADES,

Petitioners,

v.

DAVID POWELL, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF

JOHN P. KRILL, Jr.
Counsel of Record
LINDA J. SHOREY
JULIA M. GLENCER
KIRKPATRICK & LOCKHART LLP
240 North Third Street
Harrisburg, PA 17101
(717) 231-4500

Counsel for Petitioners

168353

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

11 pp

TABLE OF CONTENTS

Table of Authorities ii

Introduction 1

REASONS FOR GRANTING THE PETITION .. 1

I. The Petition Raises Matters Of National Importance 1

A. The Questionable Rationale of *Gillock* .. 1

B. Preservation of Federalism 5

C. Waiver Is Before The Court 7

Conclusion 7

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Alden v. Maine, 527 U.S. 706 (1999) 3

Behrens v. Pelletier, 516 U.S. 299 (1996) 6

Bogan v. Scott-Harris, 523 U.S. 44 (1998) 1

Church of Scientology v. United States, 506 U.S. 9 (1992) 5

Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949) 6

In re Ford Motor Company, 110 F.3d 954 (3d Cir. 1997) 5

New York v. United States, 505 U.S. 144 (1992) ... 3

Printz v. United States, 521 U.S. 898 (1997) 2, 3, 4

San Antonio School District v. Rodriguez, 411 U.S. 1 (1973) 4

Supreme Court of Virginia v. Consumers Union of the United States, 446 U.S. 719 (1980) 1

Tenney v. Brandhove, 341 U.S. 376 (1951) 4, 7

United States v. Gillock, 445 U.S. 360 (1980) 2, 3

United States v. Morrison, 529 U.S. 598 (2000) ... 3

Page

STATE CASE

Campaign for Fiscal Equity, Inc. v. State of New York 179 Misc.2d 907, 687 N.Y.S.2d 227, *aff'd*, 265 A.D.2d 277, 697 N.Y.S.2d 40 (App. Div. 1999) 4, 5

CONSTITUTION

U.S. CONST. art. I, § 6 1

STATUTE

28 U.S.C. § 1291 5

INTRODUCTION

Respondents' efforts to undermine the importance of review by this Court of the orders rejecting Petitioners' assertion of legislative immunity highlight the federalism concerns inherent in this case. This reply brief is filed, pursuant to Supreme Court Rule 15.6, to address the issues newly raised by Respondents.

REASONS FOR GRANTING THE PETITION

I. THE PETITION RAISES MATTERS OF NATIONAL IMPORTANCE

A. The Questionable Rationale of *Gillock*

Respondents acknowledge that federal legislators are protected against discovery by the Speech or Debate Clause, U.S. CONST. art. I, § 6. *See* Brief in Opposition at 14; *see also* Petition at 15-16 (citing cases). The privilege extends to state legislators, *not* because they are directly protected by U.S. CONST. art. I, § 6, but because federal common law has made the state legislative privilege coextensive in federal civil matters with that enjoyed by federal legislators under the Speech or Debate Clause. Petition at 13 (citing *Supreme Court of Virginia v. Consumers Union of the United States*, 446 U.S. 719, 733 (1980)). The immunity, in both its constitutional and common law forms, operates as a bulwark of separation of powers and legislative independence. Petition at 14-15; *see also Bogan v. Scott-Harris*, 523 U.S. 44, 52 (1998) ("[r]egardless of the level of government, the exercise of legislative discretion should not be inhibited by judicial interference").

Respondents, however, contend that this Court's decision in *United States v. Gillock*, 445 U.S. 360 (1980), dilutes the protection of common law immunity where a state legislator is sued under federal law. They argue this dilution is appropriate because there is a lack of separation-of-powers concerns between the state and federal systems. *See* Brief in Opposition at 15 (citing *Gillock*, 445 U.S. at 370). Respondents' reliance on *Gillock* places in sharp relief the critical issues of federalism implicated here.

As this Court explained in *Printz v. United States*, the Constitution preserves the States as independent political entities:

> The great innovation of this [constitutional] design was that 'our citizens would have two political capacities, one state and one federal, each protected from incursion by the other' — 'a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations of the people who sustain it and are governed by it.' The Constitution thus contemplates that a state's government will represent and remain accountable to it own citizens.
>
> * * * *
>
> This separation of the two spheres is one of the Constitution's structural protections of liberty. 'Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive

> power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.'

521 U.S. 898, 920, 921 (1997) (internal citations omitted).

This Court has never applied the rationale from *Gillock*, which arose in a criminal matter, to a civil case. *See* Petition at 13 n.9. Such an application would be in conflict with the decisions of the Court, including *Printz*, which respect the independence of state legislatures and their role in the federalist system. *See e.g., New York v. United States*, 505 U.S. 144 (1992) (Congress cannot commandeer the legislative processes of the States); *Alden v. Maine*, 527 U.S. 706, 749-759 (1999) ("In light of our constitutional system recognizing the essential sovereignty of the States, we are reluctant to conclude that the States are not entitled to a reciprocal privilege [of immunity from suit]").

The continued validity of *Gillock* is questionable, given the importance of the separation of powers between the federal government and the States' governments which this Court has stressed in its decisions over the past decade. *See e.g., United States v. Morrison*, 529 U.S. 598, 615 (2000) (emphasizing the "Constitution's distinction between national and local authority"); *Alden*, 527 U.S. 706; *Printz*, 521 U.S. 898; *New York*, 505 U.S. 144. *See also Gillock*, 445 U.S. at 374 (Renquist, J. and Powell, J., dissenting) (adopting, as the reason for dissent, the reasons given by the Sixth Circuit in favor of applying the privilege which included a frank acknowledgement of power struggles between the federal government and the states).

Concern for legislative independence in the states assumes heightened importance in the context of education, a governmental function traditionally within the province of the state, *see e.g., San Antonio School District v. Rodriguez*, 411 U.S. 1 (1973), and one that is frequently on the minds and lips of citizens. Legislative immunity, which serves to protect the public and the legislative process, *see Tenney v. Brandhove*, 341 U.S. 376, 377 (1951), enables constituents to bring their thoughts, complaints and concerns about education (and the budgets which support it) directly to their elected representatives. Legislators must be assured a sphere within which to assess and mold those concerns into legislative proposals. Access by private litigants, through discovery, to a legislator and the legislator's files, aside from providing insight into the legislative process held by no other, will serve to chill the public's willingness to participate in that policy debate. Federalism is built, in large part, upon an understanding that state government is accountable to the people.[1] *See Printz*, 521 U.S. at 920 ("The Constitution thus contemplates that a State's government will represent and remain accountable to its own citizens").

It is the nature of legislative work that makes the underlying order particularly disruptive. The legislative process involves countless individuals in addition to legislators. *Campaign for Fiscal Equity, Inc. v. State of New York*, in which private litigants sought information from an expert witness aiding state representatives on a computer model for state educational funding, provides a concrete

1. Acceptance of federal funding for education cannot act as a waiver or somehow dilute the protection of legislative immunity. No court has ever recognized a requirement that a state and its officials forfeit the common law legislative privilege in return for federal funding.

example of how litigants may attempt to gain indirect access. 179 Misc.2d 907, 687 N.Y.S.2d 227, *aff'd*, 265 A.D.2d 277, 697 N.Y.S.2d 40 (App. Div. 1999).

The discovery issue presented here is not tied, moreover, to education and this case. It could resurface in any context in which a private litigant considers himself aggrieved by legislative choices. The Court must not countenance the disruption to the legislative process that would ensue if private litigants are permitted to conduct discovery in areas involving core legislative functions.

B. Preservation of Federalism

In an attempt to downplay the significance of the underlying order to the separation of powers between federal and state government, Respondents characterize it as a run-of-the-mill discovery order. The federal courts, with the exception of the Third Circuit, do follow a general rule that routine discovery orders are not appealable under 28 U.S.C. § 1291 or the collateral order doctrine. *See e.g., Church of Scientology v. United States*, 506 U.S. 9, 18 n.11 (1992).[2] That rule, however, does not operate here.

In this case the procedural posture of the underlying order does not determine its appealability. Rather, it is the *substance*

2. The Third Circuit, which permits review for certain categories of discovery orders, including those involving "traditionally recognized privileges," is recognized to deviate from this general rule. *See In re Ford Motor Company*, 110 F.3d 954 (3d Cir. 1997); *see also* Petition at 19 n.11; Brief in Opposition at 6, 9. The point, however, is that all of the appellate courts and this Court characterize orders denying immunity as collateral orders, raising issues too important to be denied immediate review. *See* Petition at 19-20.

of the underlying order that is decisive. An order denying legislative immunity belongs to that "small class" of collateral orders for which the "rights asserted [are] too important to be denied." *Behrens v. Pelletier*, 516 U.S. 299, 305 (1996) (citing *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949)).[3] While this Court has consistently warned against over-use of collateral order jurisdiction, it has never done so in the context of legislative immunity.

Respondents contend that courts routinely refuse to exercise collateral order jurisdiction over discovery orders, even those that deny privileges. Yet, they cite only cases involving non-governmental privileges or governmental privileges that are less than absolute. *See* Brief in Opposition at 9. These privileges, while serving important societal interests, do not share the significance of the federal common law legislative privilege.[4] That privilege, like its

3. Respondents make too much of Petitioners' citation of cases involving legislative immunity from suit, as opposed to immunity from discovery. Petitioners are well aware of the holdings of these cases. They are cited because immunity from discovery is derived from the same core of immunity that provides immunity from suit. *See* Petition at 15-16.

4. Petitioners' initial refusal to respond to discovery, which Respondents for some reason point out, was not based solely on legislative privilege. Objections to relevancy (including the time-frame from within which information was sought) and public availability were also made. App. at 78a-95a; 97a-136a. An order compelling discovery over objections of relevancy and availability would have been interlocutory in nature. It is the significance of the legislative privilege to our dual system of governance that differentiates it from other discovery objections. It is the critical role the legislative privilege plays in maintaining separation of powers between the state and federal governments and in preventing disruption and interference with core legislative duties that compels Petitioners' assertion of the privilege here.

constitutional counterpart, protects the legislative process by ensuring that the exercise of legislative discretion is not inhibited by the judiciary or by private litigants "on the conclusion of the pleader." *Tenney*, 341 U.S. at 377.

C. Waiver Is Before The Court

While the Third Circuit did not, as Respondents point out, *expressly* base its refusal to assume collateral order jurisdiction on a theory that Petitioners had waived their right to raise the legislative privilege, *see* Brief in Opposition at 18, the concept of waiver pervades the entire decision. Both the panel majority and the concurring judge refused to acknowledge that a recognizable legislative privilege even existed for intervening legislators. *See* App. at 8a-9a; *see also* 18a-22a. The issue of waiver, intimately intertwined as it is with the Third Circuit's understanding of the privilege, is before this Court.

CONCLUSION

For the reasons developed above and in the Petition, the Court should grant the petition for writ of *certiorari*.

Respectfully submitted,

JOHN P. KRILL, Jr.
Counsel of Record
LINDA J. SHOREY
JULIA M. GLENCER
KIRKPATRICK & LOCKHART LLP
240 North Third Street
Harrisburg, PA 17101
(717) 231-4500

Counsel for Petitioners